Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

CLAUDE P. BAMBERGER INTERNATIONAL, INC.,

Petitioner,

v.

ROHM and HAAS COMPANY, a corporation of the State of Delaware, ATOHAAS AMERICA, INC., a corporation of the State of Delaware; RESIN MANAGEMENT CORP., a corporation of the State of Florida, PETER C. BLYTH, individually and JOHN DOES 1 through 10, being fictitious names for persons whose identities are unknown,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are:

1. Does a District Court have the right or power under the inherent powers of the court to effectively dismiss a complaint as a sanction when no order or direction of the court has been violated and the complainant has not engaged in bad faith?

2. Does a District Court have the right or power to effectively dismiss a complaint as a sanction under any provision of the Federal Rules of Civil Procedure when no order or directions of the court have been violated and the complainant has not engaged in bad faith?

Actions Of The District Court Giving Rise To The Questions Presented.

In this case, Petitioner, Claude P. Bamberger, International, Inc. ("Bamberger") sued its long time sole supplier of scrap acrylic, defendant-appellee-Rohm and Haas Company ("Rohm and Haas") and Bamberger's competitor, Resin Management Corporation ("Resin"), a Florida corporation, and Resin's President and sole owner, Peter C. Blyth ("Blyth"), a citizen of Florida, for breach of the implied covenant of good faith and fair dealing, tortious interference with prospective business advantage, fraudulent bidding and breach of express, implied and constructive contract. Jurisdiction was based on 28 U.S.C.§§ 1332, 1331 and 1337.

On August 22, 1997, during the course of discovery, the Magistrate Judge ordered Rohm and Haas to produce a report of an internal investigation conducted by Wayne G. Davis, ("the Davis Report") Rohm and Haas' Director of Corporate Security at the behest of its Chairman J. Lawrence Wilson as a result of letters received by him from employees of Rohm and Haas and Bamberger complaining of improprieties in Rohm and Haas respecting the sale of acrylic scrap by em-

ployees of Rohm and Haas and Blyth. The Davis Report had been withheld by Rohm and Haas on grounds of the attorney-client privilege and work product immunity, although Rohm and Haas did eventually identify the 12 persons interviewed and/or mentioned in the report.

When Rohm and Haas appealed the order to produce the Davis Report to the District Court, the Magistrate Judge, on an application from Rohm and Haas, entered a stay of the order pending appeal.

On November 14, 1997, a hearing was held before the Magistrate Judge on discovery matters. At that hearing the Magistrate Judge *sua sponte* and without any request by defendants, reduced the number of depositions that Bamberger could take as set forth in the Rule 16 Conference from 15 to 10. *Nevertheless, the Magistrate Judge directed that Bamberger delay depositions of those persons mentioned in the Davis Report until after the District Court decided Rohm and Haas' appeal so as not to depose them twice.*

The Magistrate Judge also set discovery to end in 90 days. Rohm and Haas' appeal to the District Court was likely to be decided in sufficient time for Bamberger to decide who to take and when with the benefit of the Davis Report and still meet the discovery cut-off date.

The District Court Judge affirmed the Magistrate Judge's decision by Opinion and Order filed December 29, 1997. Nevertheless, on January 27, 1998 Rohm and Haas appealed to the Third Circuit Court of Appeals. The stay of producing the Davis Report continued.

At this point, Bamberger was put to an election not of its own choice. Take depositions of non-Davis Report witnesses and sacrifice the right to take an equal number of Davis Report witnesses without having the benefit of the Davis Report, or take one or more of the Davis Report witnesses without the benefit of the Davis Report and be unable to re-depose them

after production of the Davis Report, or use all 10 depositions allowed by the Magistrate Judge, to take Davis Report witnesses after a decision on Rohm and Haas' continued appeal, *as permitted by the Magistrate Judge.*

On February 11, 1998, before expiration of discovery, a status conference was held before the Magistrate Judge at which time Bamberger requested an extension of the discovery period. An extension would have permitted Rohm and Haas' appeal to the Third Circuit on the Davis Report to run its course, and if affirmed, allow Bamberger to comply with the Magistrate Judge's admonition not to depose those witnesses twice yet permit Bamberger to depose such witnesses. It would also have provided Bamberger the right to make a selection of the 10 witnesses who could be deposed with the benefit of the Davis Report, which the District Court had already ordered be produced.

Instead of granting Bamberger's speaking motion to extend the discovery period at the Case Management Conference on February 17, 1998, at the direction of the Magistrate Judge, Bamberger filed a formal motion to extend the discovery period.

On May 27, 1998, the Magistrate Judge denied Bamberger's motion to extend the discovery period. At the same time, the Magistrate Judge, *sua sponte*, and without any motion by defendants, sanctioned Bamberger for not having taken any depositions within the prior 90 days, by denying Bamberger the right to take any of the Davis Report witnesses after a final decision on appeal. *There was no order of the court, warning or admonition that Bamberger had to take any, let alone some undefined number of depositions during the 90 day period as a condition precedent to taking any Davis Report witnesses after a final decision of Rohm and Haas' appeal as directed by the Magistrate Judge to avoid taking the Davis Report witnesses twice.*

This decision by the Magistrate Judge, affirmed by the District Court was the functional equivalent of dismissing Bamberger's complaint. Without any depositions, even of only the Davis Report witnesses, there was little, if any, chance of Bamberger surviving a motion for summary judgment. This turned out to be the case.

LIST OF PARTIES

All parties in the courts below are listed in the caption to this petition.

RULE 29.6 STATEMENT

In accordance with Sup. Ct. R. 29.6, petitioner states that it does not have any publicly owned corporate parent, subsidiary or affiliate.

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Claude P. Bamberger International, Inc. ("Bamberger") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit filed on September 24, 2001, affirming the order of the District Court granting summary judgment in favor of Rohm and Haas, Resin and Blyth.

OPINIONS BELOW

The September 24, 2001 opinion and order of the Court of Appeals is unreported and appears in the Appendix hereto (A-26 to A-36). The opinion and order for summary judgment of the District Court filed October 26, 2001, affirmed by the Court of Appeals upon which this petition is based, is unreported and appears in the Appendix hereto (A-1 to A-25). An order and opinion of the District Court affirming the Magistrate Judge's refusal to extend or reopen discovery is unreported and appears in the Appendix hereto (A-41 to A-55).

BASIS OF JURISDICTION

The judgment of the Court of Appeals was entered on September 24, 2001. Petitioner filed a petition for rehearing and suggestion for rehearing *en banc* which was denied on October 30, 2001 (A-39 to A-40). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The District Court had jurisdiction to hear Petitioner's claims under 15 U.S.C.§ 1125(a) and 28 U.S.C. §§1331, 1332(a)(1) and 1367. The Court of Appeals for the Third Circuit had appellate jurisdiction under 28 U.S.C. §1291.

STATUTORY PROVISIONS INVOLVED

None.

STATEMENT OF THE CASE

Bamberger is a purchaser for resale of acrylic scrap. It enjoyed a nearly 40 year business relationship with Rohm and Haas and for many years had purchased acrylic scrap gener-

ated by Rohm and Haas in a number of its manufacturing plants. At the request of Rohm and Haas, Bamberger developed foreign markets for this scrap in Asia. The relationship between Bamberger and Rohm and Haas was always very good.

The business relationship between Bamberger and Rohm and Haas was on a personal basis between Claude Bamberger and his wife, Mo-Li Siow and personnel in the various Rohm and Haas plants. Prices were established by negotiation and sales generally on open contracts, which were continued by both parties beyond their nominal termination dates.

Beginning in about 1989, a management official of Rohm and Haas having control of its Matamoros, Mexico plant, which had been selling scrap to Bamberger, signed an exclusive contract with the predecessor of Resin, then owned by Blyth and another, whom Blyth bought out and thereafter created Resin. Bamberger was thereby precluded from bidding on scrap generated by that plant and all of it went to Blyth and his corporate entities.[1] At that time, Blyth had no previous experience in the business, Resin had no storage facilities and no employees other than Blyth and his associate. Bamberger protested this exclusionary arrangement but to no avail.

Thereafter, Bamberger alleges that Rohm and Haas began a campaign of shifting all of its scrap business from Bamberger to Resin despite the fact that Bamberger was offering higher prices. Rohm and Haas clandestinely gave preferences to Resin, cutting Bamberger off from essentially its sole source of supply. Bamberger alleged that when Rohm and Haas introduced a bidding mechanism and Bamberger was the successful bidder, scrap which should have gone to Bamberger was clandestinely diverted to Resin at lower prices than those

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[1] In its complaint, Bamberger charged that Resin was the *alter ego* of Blyth.

offered by Bamberger. At first, Rohm and Haas claimed it had no scrap to sell, but when challenged by Bamberger, Rohm and Haas admitted to selling to Resin, claiming that it had secretly decided not to sell all of its scrap by bid.

Ultimately, Rohm and Haas excused its conduct by telling Bamberger that Resin and Blyth better met its needs without further explanation.[2]

Bamberger filed its complaint on March 5, 1996. All defendants were served by March 20, 1996. Blyth moved to dismiss the complaint against him for lack of personal jurisdiction. The District Court denied Blyth's motion challenging jurisdiction on June 21, 1996. The Magistrate Judge did not issue an order until September 16, 1996 setting the Rule 16 Conference for October 23, 1996. As provided by the Fed. R. Civ. P. 26(d), the parties were not permitted to engage in discovery until the initial scheduling conference. Resin served its responses to Bamberger's paper discovery on December 20, 1996, replete with the blanket objections that the interrogatories and document requests were "overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence."

In December 26, 1996 and on January 16, 1997 Rohm and Haas served Bamberger with responses to Bamberger's interrogatories and requests for production of documents.

By virtue of having been interviewed, Bamberger was already aware of the Davis Report. Rohm and Haas refused to produce the Davis Report on grounds of the attorney-client privilege and work product immunity, although it did eventually identify the 12 persons interviewed and/or mentioned in the report. On February 20, 1997, Bamberger, as directed by

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[2] A more full description of the conduct of Rohm and Haas can be found in the Declarations of Mo-Li Siow contained in the Appendix filed with the Court of Appeals.

the Magistrate Judge, filed a motion on short notice to compel Rohm and Haas to produce the Davis Report.

On August 12, 1997, the Magistrate Judge issued an Opinion and Order compelling Rohm and Haas to produce the Davis Report. When Rohm and Haas appealed from the Order, the Magistrate Judge, on an application from Rohm and Haas, entered a stay of the Order pending the appeal to the District Court Judge.

On November 14, 1997, a hearing was held before the Magistrate Judge on unresolved discovery disputes in Bamberger's motion to compel interrogatory answers and document demands. During this hearing, the Magistrate Judge *sua sponte* and without any request by defendants, reduced the number of depositions that Bamberger could take from 15 to 10. *Nevertheless, the Magistrate Judge directed that Bamberger delay taking the depositions of those persons mentioned in the Davis Report, until after the District Court decided Rohm and Haas' appeal so as not to depose them twice.*

At this point, Bamberger was put to an election not of its own choice. Take depositions of non-Davis Report witnesses and sacrifice the right to take an equal number of Davis Report witnesses without having the benefit of the Davis Report, or, take one or more of the Davis Report witnesses without the benefit of the Davis Report and be unable to re-depose them after production of the Davis Report, or, use all 10 depositions allowed by the Magistrate Judge to take Davis Report witnesses after a decision by on Rohm and Haas' continued appeal, *as permitted by the Magistrate Judge.*

The Magistrate Judge also set discovery to end in 90 days. Rohm and Haas' appeal to the District Court was likely to be decided in sufficient time for Bamberger to decide who to take and when, with the benefit of the Davis Report, and still meet the discovery cut-off date. The decision of the Magistrate Judge was memorialized in an Order of December 5, 1997.

As of the hearing on November 14, 1997, there was time, albeit potentially little time, for Bamberger to take depositions after a decision on the appeal to the District Court. What neither Bamberger nor the Magistrate Judge could know, was that Rohm and Haas would appeal any affirmance by the District Court to the Third Circuit. On December 29, 1997, the District Court affirmed the Magistrate Judge's August 12, 1999 Order to produce the Davis Report. Rohm and Haas appealed to the United States Court of Appeals for the Third Circuit. The stay on producing the report was continued, compounding Bamberger's dilemma.[3] There was now about six weeks before the discovery cut-off.

Now, by yet another appeal, Rohm and Haas had frustrated, the intention of both the Magistrate Judge and the District Court that Bamberger have the benefit of the use of the Davis Report in determining who to take and when, of the limited number of depositions permitted. Believing the Davis Report witnesses, numbering more than the number of depositions permitted, to be the most important witnesses, and *abiding by the directions of the Magistrate Judge*, Bamberger elected to defer deposing those witnesses until a decision by the Third Circuit. For complying with the Magistrate Judge's directions, and without violating any orders of the court, Bamberger was *sanctioned* by *sua sponte* being deprived of the right to take any depositions, even of the Davis Report witnesses.

On February 11, 1998, before expiration of discovery, a status conference was held before the Magistrate Judge at which time Bamberger requested an extension of the discovery period. This extension would have permitted Rohm and Haas' appeal to the Third Circuit on the Davis Report to run

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[3] The Davis Report, when finally produced by Rohm and Haas disclosed the existence of documents in the possession of Rohm and Haas which were obviously not privileged and have never been produced by Rohm and Haas even to this day.

its course, and if affirmed, allow Bamberger to comply with the Magistrate Judge's admonition not to depose those witnesses twice, yet permit Bamberger to depose such witnesses once. It would also have provided Bamberger the right to make a selection of the 10 witnesses who could be deposed with the benefit of the Davis Report which the District Court had already ordered be produced.

Instead of granting Bamberger's speaking motion to extend the discovery period at the Case Management Conference on February 17, 1998, at the direction of the Magistrate Judge, Bamberger filed a formal motion to extend the discovery period.

On May 27, 1998, the Magistrate Judge denied Bamberger's motion to extend the discovery period. At the same time, the Magistrate Judge, *sua sponte*, sanctioned Bamberger for not having taken any depositions within the prior 90 days by denying Bamberger the right to take any of the Davis Report witnesses after a final decision on appeal.[4] *There was no order of the court, warning or admonition that Bamberger had to take any, let alone some undefined number of depositions during the 90 day period as a condition precedent to taking any Davis Report witnesses after a final decision of Rohm and Haas' appeal as directed by the Magistrate Judge to avoid taking the Davis Report witnesses twice.*

This decision by the Magistrate Judge, affirmed by the District Court was the functional equivalent of dismissing Bamberger's complaint. Without any depositions and with the

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[4] The Magistrate Judge never suggested that Bamberger elect to take the deposition of any Davis Report witness before a decision by the Third Circuit if one were taken and thereby either sacrifice the right to take that deposition after a decision or take such depositions twice. The whole object of not taking the depositions of the Davis Report witnesses was to prevent taking them twice. Simply stated, the Davis Report could and likely would provide additional information on how to examine those persons.

Magistrate Judge's drastic limitation of the scope of Bamberger's paper discovery, there was little, if any, chance of Bamberger surviving a motion for summary judgment on those issues. This turned out to be the case.

On June 12, 1998, Bamberger moved for reconsideration of the May 27, 1998 Order denying Bamberger's motion to extend the discovery period. On July 14, 1998, the Magistrate Judge denied Bamberger's motion for reconsideration of the May 27, 1998 Order.

As part of its reconsideration motion, Bamberger accepted the Magistrate Judge's prior invitation (not order) to substantiate the allegations in the complaint by filing a lengthy and detailed Declaration of Mo Li Siow ("Siow") Bamberger's Vice President. In her declaration, Siow presented an exhaustive analysis of the documents which had been produced by the defendants. This analysis showed a number of important discrepancies between documents produced by Rohm and Haas and Resin as well as the likelihood that certain documents ordered produced had not been produced. This analysis showed unexplained preferences given to Resin at the expense of Bamberger. These preferences showed that Rohm and Haas had long since decided to terminate doing business with Bamberger, had hid that fact from Bamberger, stringing Bamberger along, until it was too late for Bamberger to find alternative sources of supply.

The Magistrate Judge denied Bamberger's motion for reconsideration in an Opinion and Order filed July 14, 1998. In that Opinion, the Magistrate Judge dismissed the Siow Declaration as merely rehashing the complaint. Bamberger appealed from the May 27, 1998 and July 14, 1998 Orders pursuant to L. Civ. R. 72.1 (c)(1)(A) on July 29, 1998.

On September 23, 1998, the District Court affirmed the Magistrate Judge's Orders of May 27 and July 14, 1998 denying Bamberger's motion to extend the discovery period.

On July 16, 1998, the United States Court of Appeals for the Third Circuit entered a Briefing and Scheduling Order for the appeal regarding production of the Davis Report. Knowing that Bamberger had effectively been denied any deposition discovery and therefore having nothing to fear, on August 21, 1998, a few days before its appellate brief was due, Rohm and Haas voluntarily produced the Davis Report and moved to dismiss its own appeal. By Order dated September 14, 1998, the appeal was dismissed.

The Davis Report consists of 13 pages. The first four pages are a memorandum dated September 29, 1995, authored by Wayne Davis, and addressed to Albert Caesar, President of AtoHaas. The memo recounts that Larry Wilson, Chairman of Rohm and Haas, had received three letters, the first dated July 29, 1995, an anonymous letter apparently from a Rohm and Haas employee describing allegations of improprieties in the disposal of acrylic scrap — the same allegations made by Bamberger in this lawsuit. A second anonymous letter, also apparently from a Rohm and Haas employee at another location from the first, said essentially the same thing. The third letter, dated August 16, 1995, was from Claude Bamberger.

The memo by Davis goes on to describe the protocol for the investigation and provides a conclusion to his findings. The two anonymous letters (mentioned above) which were purportedly written by Rohm and Haas employees located at the Louisville and Bristol plants, respectively, were produced to Bamberger only after the close of discovery.

Based upon the newly found evidence contained in the Davis Report, on September 25, 1998, Bamberger filed a motion to reopen discovery. On October 15, 1998, the Magistrate Judge denied Bamberger's motion prior to Bamberger filing a reply brief and on October 28, 1998, denied Bamberger's motion to file a reply brief. On November 4, 1998, Bamberger appealed the Magistrate Judge's denial of Bam-

berger's motion to reopen discovery but the District Court affirmed the Magistrate Judge.

On January 28, 1999, while the appeal of the Magistrate's Judge's refusal to reopen discovery was still pending, Bamberger filed a motion to take *de bene esse* depositions of certain witnesses who were named in the Davis Report and outside the trial subpoena power of the court to preserve their testimony for trial. On February 25, 1999, the Magistrate Judge entered an Order and Opinion denying Bamberger the right to take depositions *de bene esse*. In his decision, the Magistrate Judge refused to take judicial notice that witnesses identified by defendants in their Fed. R. Civ. P. 26(a)(1) disclosures as living and working in Florida, Texas, Tennessee, and Kentucky were outside of the 100 mile radius of the subpoena power of the Court.

On August 23, 1999, the District Court affirmed the Magistrate Judge's denial of Bamberger's motion to reopen discovery, based upon the production of the Davis Report and its motion to take *de bene esse* depositions.

On June 29, 2000, Resin and Rohm and Haas moved for summary judgment. Bamberger filed opposition and cross-moved to take additional discovery.

On October 26, 2000, the District Court granted Resin and Rohm and Haas' motions for summary judgment and denied Bamberger's cross-motion for additional discovery to take the depositions of the Davis Report witnesses. In its opinion, the District Court chose to dismiss the declaration of Siow almost in its entirety, characterizing it as containing "impermissible legal conclusions and hearsay." In the process, the District Court characterized statements made by Rohm and Haas employees directly to Siow as hearsay.

The District Court also denied Bamberger's motion to take the deposition of an affiant of Rohm and Haas, filed in support of its motion for summary judgment which offered in-

formation never previously provided by Rohm and Haas, on the grounds that he had not been previously deposed.

REASONS FOR GRANTING THE PETITION

The District Court affirmed the Magistrate Judge's sanctioning of Bamberger for not taking some unspecified number of non-Davis Report witnesses within a 90-day period prior to the scheduled close of discovery. This affirmance stripped Bamberger of the previously given right to take depositions of the most important Davis Report witnesses after resolution of Rohm and Haas' appeal of the Order compelling it to produce the Davis Report. The deprivation of the right to depose these persons, was tantamount to dismissal of the complaint. There is no dispute that no order existed requiring Bamberger to take any depositions of anyone during the 90-day period preceding the scheduled close of discovery as a condition precedent to Bamberger exercising the right and directions of the Magistrate Judge, that depositions of the Davis Report witnesses not be taken before a decision on the appeal of Rohm and Haas challenging the order to produce that report.

The analysis as to whether Bamberger's Constitutional Right to Due Process under the Fifth Amendment has been violated must address whether a Magistrate Judge can impose a sanction under Rule 37(b)(2) on a party, when that party has not committed any sanctionable conduct under that rule. Similarly, the analysis must address whether the Magistrate Judge had the right to so sanction Bamberger under Fed. R. Civ. P. 16(f) for not deposing some unspecified, non-Davis Report witnesses within 90 days prior to the scheduled close of discovery when no order existed requiring such depositions. Lastly, the analysis must address whether the District Court has the power to affirm the conduct of the Magistrate Judge under the inherent power of the court, despite the fact that the Magistrate Judge did not and could not sanction Bamberger under the inherent power of the court, because the Magistrate Judge is not an Article III judge. Lastly, the analy-

sis must address whether the District Court had the power to sanction Bamberger under the inherent powers of the court or as "case management" as limited by The United States Supreme Court because Bamberger had not been guilty of bad faith.

In affirming the Magistrate Judge's imposition of sanctions, the District Court ignored controlling precedent of this Court such as *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991); *Societe Internationale Pour Participations Industrielles et Commerciales, S. A. v. Rogers*, 357 U.S. 197 (1958); and *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites De Guinea*, 456 U.S. 694 (1982).

The Magistrate Judge Sanctioned Bamberger For Not Deposing Some Unspecified Number of non-Davis Report Witnesses In The 90-Day Period Before The Scheduled Close Of Discovery.

When Bamberger moved to extend the discovery period before its end, the Magistrate Judge did not merely deny the extension. Rather, he reversed his prior directions not to take the Davis Report witnesses twice by deferring them until after Rohm and Haas' appeal was decided, whenever that may have been, and denied Bamberger the right to depose the Davis Report witnesses after the appeal was decided. *This was not merely a denial of the extension of discovery subtending the Davis Report witnesses but rather a sanction for the alleged breach of a non-existing order.* Moreover, the District Court affirmed the Magistrate Judge's denial of a number of Bamberger motions made thereafter for reconsideration.

In essence, the District Court affirmed the Magistrate Judge's sanctioning of Bamberger by denying it the right to take depositions of the Davis Report witnesses after a final decision on Rohm and Haas' appeal as approved and directed by the Magistrate Judge.

The Magistrate Judge, not being an Article III Judge could not invoke the inherent powers of the court as a basis for imposing the sanction imposed but rather only under Fed. R. Civ. P. 37(b)(2) or Fed. R. Civ. P. 16(f).[5] While the District Court had the *power* to exercise the inherent powers of the court, it did not do so but rather treated the Magistrate Judge's imposition of the sanction as "not contrary to law or clearly erroneous" as a sanction under Fed. R. Civ. P. 37(b)(2).[6] If the District Court chose to affirm the Magistrate Judge as a sanction under the inherent powers of the District Court, clearly it would have violated controlling precedent of this Court and Bamberger's Due Process rights under the Fifth Amendment to the Constitution of the United States.[7]

In the final analysis, the ultimate question is whether the District Court had the power under the inherent powers of the court to sanction Bamberger when Bamberger had violated no order or engaged in bad faith.

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[5] There was no suggestion by the Magistrate Judge that the sanction was permitted as "case management" rather than a sanction under Fed. R. Civ. P. 37. Had the Magistrate Judge just refused to extend the general discovery period but not sanctioned Bamberger by denying it the right to take the Davis Report witnesses after a decision by the Third Circuit *or* taken a less drastic remedy such as directing that the Davis Report witnesses proceed without the David Report being produced, the interests of "case management" would have been met.

[6] It is axiomatic that if there was no basis in law for the Magistrate Judge to have sanctioned it, then it was *per force* an abuse of discretion for the District Court to affirm for those reasons.

[7] In affirming the Magistrate Judge, the District Court did not address whether it was affirming the sanction as an application of Rule 37(b)(2), Rule 16(f) or the inherent powers of the court. Nevertheless, in denying Bamberger motion to reopen discovery after production of the Davis Report, the District Court made it clear that the basis for sanctioning Bamberger by depriving it of the right to depose Davis Report witnesses after a decision on Rohm and Haas' appeal was solely because Bamberger did not depose some unspecified number of non-Davis Report witnesses in the 90-day period before close of fact discovery. (A-43, A-47, A-51)

As will appear below, the District Court raised the inherent powers of the court for "case management" above the United States Constitution.

There Was No Basis For The Imposition Of Sanctions Against Bamberger Under Fed. R. Civ. P. 37(b)(2) or Fed. R. Civ. P. 16(f).

This Court has recognized that a District Court may not effectively rewrite or interpret the application of Fed. R. Civ. P. 37(b)(2) to cover acts or conduct not expressly covered by that rule because these rules were adopted by Congress exercising its Constitutional prerogative to provide district courts with a comprehensive arsenal of Federal rules and statutes to protect themselves from abuse. *See* dissent by Justice Kennedy in *Chambers*, 501 U.S. at 61, joined by the Chief Justice and Justice Souter, as well as 28 U.S.C. § 2071 *et seq.*

Fed. R. Civ. P. 37(b)(2) provides in relevant part:

> If a party or an officer, director, or managing agent of a party . . . fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just. . .

Id.[8]

Nowhere in Rule 37 is a sanction to be imposed *unless there has been a violation of an order.* Rule 37(b)(2) applies only to violations of orders to provide or permit discovery including under Rule 37 (a) [motions for an order compelling disclosure or discovery]. Therefore, there was no basis in law

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[8] Fed. R. Civ. P. 26(f) deals with preparation for the Rule 16 Conference and Fed. R. Civ. P. 35 deals with Physical and Mental Examinations of Persons neither of which are implicated in this case.

for the Magistrate Judge to have sanctioned Bamberger under Fed. R. Civ. P. 37(b)(2).

Fed. R. Civ. P. 16(f) provides for sanctions for violation of a scheduling order. The scheduling order of the Magistrate Judge dated December 5, 1997 provided for the close of fact discovery in 90 days. Nevertheless, the Magistrate Judge also directed Bamberger to avoid taking the Davis Report witnesses twice by deferring their depositions until after a decision on the appeal of Rohm and Haas of the order directing it to produce the Davis Report.

Neither the Magistrate Judge nor the District Court justified reversing the prior directions of the Magistrate Judge about taking depositions of the Davis Report witnesses and imposing a bar on all such depositions under Rule 16(f). Obviously, the order scheduling the close of fact discovery had to be read with the directions of the Magistrate Judge which permitted and directed Bamberger's conduct. Therefore, the District Court affirmed the sanction based on Bamberger's not taking some unspecified number of non-Davis Report witnesses within the 90-day period. *No such order existed.*

In *Societe Internationale* this Court said:

> The provisions of Rule 37 which are here involved must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law, and more particularly against the opinions of this Court in *Hovey v. Elliott*, 167 U.S. 409, 17 S. Ct. 841, 42 L. Ed. 215, and *Hammond Packing Co. v. Arkansas*, 212 U. S. 322, 29 S. Ct. 370, 53 L. Ed. 530. These decisions establish that there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his case. The authors of Rule 37 were well aware of these constitutional considerations. *See Notes of Advisory*

> *Committee on Rules*, Rule 37, 28 U.S.C (1952 ed.), p. 4325, 28 U.S.C.A.

Societe Internationale, 357 U.S. at 209.

Therefore, it is abundantly clear that the use of Rule 37 sanctions are subject to the limitations imposed by this Court in *Chambers* on the exercise of the court's inherent powers. However, that is *not* to say that such are the only limitations imposed on the exercise of Rule 37. [9]

The District Court Lacked The Power Under The Inherent Powers Of The Court To Sanction Bamberger

The District Court lacked the power to sanction Bamberger under the inherent powers of the court. *Chambers,* 501 U.S. 32. *Chambers* involved the imposition of counsel fees as a sanction for bad faith saying:

> . . . the court found Chamber's actions were part of [a] sordid scheme of deliberate misuse of the judicial process 'designed' to defeat NASCO's claim by harassment, repeated and endless delay, mountainous expense and waste of financial resources.

Chambers, 501 U.S. at 57.[10]

This Court said: "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion. . . ." *Chambers,* 501 U.S. at 45, citing *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 764, 65 L. Ed. 2d 488, 100 S. Ct. 2455 (1980). The majority in *Chambers* held that ". . . a court may assess attorney's fees when a party has 'acted in bad faith vexatiously, wantonly, or for oppressive reasons." (citations omitted) *Chambers,* 501 U.S. at 45.

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[9] Bamberger submits that the same limitations apply to at least Fed. R. Civ. P. 16(f).

[10] No such facts exist in this case.

In *Roadway Express*, this Court said:

> The due process concerns posed by an outright dismissal are plainly greater than those presented by assessing counsel fees against lawyers.

Roadway Express, 447 U.S. at 767, n.14.

In *Link v. Wabash R. Co.*, 370 U.S. 626 (1962) this Court affirmed the District Court's dismissal of the complaint by virtue of plaintiff's counsel's failure to attend the pretrial conference. However, the Court based it affirmance in part because of the failure of plaintiff's attorney to move the reopen under Fed. R. Civ. P. 60 (b) saying:

> Nor need we consider whether the District Court would have been abusing its discretion had it rejected a motion under Rule 60 (b) which was accompanied by a more adequate explanation for the absence of petitioner's counsel from the pretrial conference. No such motion was ever made, so that there is nothing in the record before us to indicate that counsel's failure to attend the pretrial conference was other than deliberate or the product of neglect.

Link, 370 U.S. at 635-36.

In *Degen v. United States*, 517 U.S. 820 (1996), this Court said:

> Courts invested with the judicial power of the United States have certain inherent authority to protect their proceedings and judgments in the course of discharging their traditional responsibilities. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-46, 115 L. Ed. 2d 27, 111 S. Ct. 2123 (1991); *Link v. Wabash R. Co.*, 370 U.S. 626, 630-631, 8 L. Ed. 2d 734, 82 S. Ct. 1386 (1962); *United States v. Hudson*, 7 Cranch 32, 34, 3 L. Ed. 259 (1812). The extent of these powers must be delimited with care, for there is a danger of overreaching when one branch

> of the Government, without benefit of cooperation or correction from the others, undertakes to define its own authority. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764, 65 L. Ed. 2d 488, 100 S. Ct. 2455 (1980). In many instances the inherent powers of the courts may be controlled or overridden by statute or rule. *Carlisle v. United States, ante*, at 426; *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254, 101 L. Ed. 2d 228, 108 S. Ct. 2369 (1988). Principles of deference counsel restraint in resorting to inherent power, *Chambers v. NASCO, supra*, at 44, and require its use to be a reasonable response to the problems and needs that provoke it, *Ortega-Rodriguez v. United States, supra*, at 244; *Thomas v. Arn*, 474 U.S. 140, 146-148, 88 L. Ed. 2d 435, 106 S. Ct. 466 (1985).[11]

Degen, 517 U.S. at 828.

In *Societe Internationale*, this Court rejected the court of appeals' reliance on inherent powers to uphold a dismissal of a complaint for failure to comply with a production order noting that "reliance upon . . . 'inherent power' can only obscure analysis of the problem" and finding that "whether a court has power to dismiss a complaint because of non-compliance with a production order depends exclusively upon Rule 37. *Societe Internationale*, 357 U.S. at 207.[12]

Under the broadest interpretation of *Chambers*, a sanction can be imposed under the inherent powers of the court only

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[11] *Cf.* Justice Scalia's concurring in judgment opinion in *Young v. United States, ex rel. Vuitton et Fils, S. A.*, 481 U.S. 787 (1987) that inherent powers are only those necessary to permit the courts to function. While the majority in *Chambers* did not require "necessity" for the exercise of the inherent powers of the court, necessity is still a factor under the requirement that the sanction go no further than required under the entirety of the circumstances of the case.

[12] *Cf.* Justice Kennedy's dissent, joined by the Chief Justice and Justice Souter in *Chambers*, 501 U.S. at 64-65.

when the party sanctioned has engaged in *bad faith*. The same limitation applies to the imposition of sanctions under Fed. R. Civ. P. 37(b)(2), 16(f) or 41(b). Bad faith cannot exist for violating an order that does not exist, or, for following the directions of the court.

CONCLUSION

The District Court lacked the power to deprive Bamberger of its right to depose the Davis Report witnesses as a sanction under either any provision of the Federal Rules of Civil Procedure or under the inherent powers of the court. The conduct of the District Court therefore violated Bamberger's right to due process under the Fifth Amendment to the Constitution of the United States.

Dated: January 28, 2002

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CLAUDE P. BAMBERGER INTERNATIONAL, INC.,

Plaintiff,

v.

ROHM and HAAS COMPANY, a corporation of the State of Delaware, ATOHAAS AMERICA, INC., a corporation of the State of Delaware; RESIN MANAGEMENT CORP., a corporation of the State of Florida, PETER C. BLYTH, individually and JOHN DOES 1 through 10, being fictitious names for persons whose identities are unknown,

Defendants.

Civ. No. 96-1041 (WGB)

ORDER FOR SUMMARY JUDGMENT

ENTERED ON THE DOCKET
OCT 27 2000
WILLIAM T WALSH, CLERK
By: /s/
(Deputy Clerk)

FILED
OCT 26 2000

CLOSED

This matter having come before the Court on Defendants Rohm and Haas Company and Atohaas America, Inc.'s motion for summary judgment; and on Defendants Resin Management Corp. and Peter C. Blyth's motion for summary judgment; and

The Court having considered the submissions of counsel; and

The Court having heard oral argument on October 25, 2000; and

For good cause shown;

It is on this 26th day of October, 2000 ORDERED that Defendant Resin Management Corp. and Peter C. Blyth's motion for summary judgment is **granted**; and

IT IS FURTHER ORDERED that all counts of Plaintiff's complaint against Resin Management Corp. and Peter C. Blyth are **dismissed with prejudice**; and

IT IS FURTHER ORDERED that Defendant Rohm and Haas Company, and Atohaas America, Inc.'s motion for summary judgment is **granted**; and

IT IS FURTHER ORDERED that all counts of Plaintiff's complaint against Defendant Rohm and Haas Company, and Atohaas America, Inc. are **dismissed with prejudice**; and

IT IS FURTHER ORDERED that Plaintiff's application for additional discovery is **denied**; and

IT IS FURTHER ORDERED that the Clerk of the Court shall close this case.

/s/ William G. Bassler

WILLIAM G. BASSLER, U.S.D.J.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CLAUDE P. BAMBERGER INTERNATIONAL, INC.,

Plaintiff,

v.

ROHM and HAAS COMPANY, a corporation of the State of Delaware, ATOHAAS AMERICA, INC., a corporation of the State of Delaware; RESIN MANAGEMENT CORP., a corporation of the State of Florida, PETER C. BLYTH, individually and JOHN DOES 1 through 10, being fictitious names for persons whose identities are unknown,

Defendants.

Civ. No. 96-1041 (WGB)

OPINION

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(Deputy Clerk)

FILED
OCT 26 2000

CLOSED

APPEARANCES:

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BASSLER, DISTRICT JUDGE:

Defendants Rohm and Haas Company ("R&H") and Atohaas Americas, Inc. ("A&H") (collectively "R&H Defendants") move for summary judgment. Defendants Resin Management Corp. ("Resin") and Peter C. Blyth ("Blyth") (collectively "Resin Defendants") separately move for summary judgment. Plaintiff cross-moves to take additional discovery. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, (federal question) and 1367 (pendent), or pursuant to 28 U.S.C. § 1332 (diversity).

For the reasons set forth below, the R&H Defendants' motion is **granted**. The Resin Defendants' motion is also **granted**, and Plaintiff's cross-motion is **denied**.

I. BACKGROUND

Plaintiff Claude P. Bamberger International, Inc. ("Bamberger" or "Plaintiff") is in the business of buying and selling acrylic scrap. Bamberger is owned by Claude Bamberger. Mo-Li Siow, ("Siow"), a Vice President of Bamberger, is married to Claude Bamberger. She has been in charge of marketing

and sales since 1979. Bamberger and Resin were at all relevant times competitors.

During various periods of time, R&H and A&H[1] had facilities engaged in the production of acrylic resin and sheet products. The process used to manufacture these products occasionally yielded off-grade acrylic scrap. The facilities that generated off-grade acrylic scrap were located in Bristol, Pennsylvania, Louisville, Kentucky, Knoxville, Tennessee, Matamoras, Mexico, Kensington, Connecticut, and Morrisburg, Canada. Since the 1940's, Bamberger purchased acrylic scrap from R&H.

Sometime in the mid to late 1980's, Bamberger explored and allegedly established a foreign market for off-grade acrylic scrap. Declaration of Mo-Li Siow ("Siow Decl." or "Siow Declaration"), at ¶ 100, Ex. F.

Until January 1, 1995, the sale of off-grade acrylic scrap was a matter left to the discretion of personnel at each plant and was handled through annually negotiated purchase orders or so-called spot purchase orders for odd lot amounts. (Pawlikowski Decl., at ¶ 3.) Purchase orders covering the annual quantities were negotiated and expired on an annual basis. (R&H Statement of Material Facts ("R&H SOMF"), at ¶ 11.) The terms of these purchase orders, including time period, quantity, price, and shipping dates, were negotiated annually between representatives and Bamberger and R&H. (*Id.*) Spot purchase orders covered scrap that was periodically available

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[1] A&H was formed as a joint venture company in 1992. R&H owned 50% of the stock of the joint venture company. Effective June 4, 1998, R&H sold its 50% interest in A&H. Declaration of Joseph Pawlikowski ("Pawlikowski Decl." or "Pawlikowski Declaration"), at ¶ 2.

During oral argument, counsel for Bamberger, for the first time, objected to the Court's consideration of information contained in the Pawlikowski Declaration that included information that had not been previously provided to Bamberger during deposition. There is, however, no evidence that Bamberger ever even deposed Pawlikowski at all.

and not covered by the annual purchase orders. These spot purchases were separately negotiated by the parties. (Deposition of Siow ("Siow Dep."), attached as Ex. B & C to Declaration of Richard Shapiro, at 323-24.)

On November 7, 1994, A&H advised Bamberger that it intended to change its procedures for selling off-grade acrylic scrap beginning on January 1, 1995. (Siow Decl., at ¶ 60.) During the first two quarters of 1995, A&H instituted a new procedure and solicited competitive bids from vendors for scrap at its Louisville and Bristol plants. (Pawlikowski Decl., at ¶ 3.) As a result of the bids that were received during those two quarters, Bamberger and Resin each purchased various quantities of off-grade acrylic scrap from A&H. (*Id.* at ¶ 4.) Some of the scrap sent to Resin and Blyth were improperly shipped under Bamberger's purchase order numbers. (Bamberger Response to L. Civ. R. 56.1 Statement ("Pl.'s SOMF"), at ¶¶ 58-59.)

During 1995, Resin made a proposal to management of A&H that it be permitted to purchase 100% of the off-grade acrylic scrap production from the Bristol and Louisville plants so that it could secure a reliable supply of acrylic scrap for its contract with Arco Chemical ("Arco"). (Ex. F attached to Pawlikowski Decl.) Resin secured a long-term arrangement with Arco to supply off-grade acrylic scrap in large quantities to be used in the manufacture of Dylark resin. (R&H SOMF, at ¶ 14; Pawlikowski Decl., Ex. F.) Dylark resin was subsequently sold to Ford for use in the manufacture of instrument panels for automobiles. A&H agreed to sell 100% of the off-grade acrylic scrap produced at two of its plants, Louisville and Bristol, to Resin beginning in July 1995. (Pawlikowski Decl., at ¶ 6.) According to R&H, this decision was based in part on the understanding that A&H would receive high value and that the off-grade acrylic scrap would not be reused in the same markets as A&H virgin products. (*Id.*)

Beginning in the second quarter of 1996, A&H sold approximately 75% of its off-grade acrylic scrap at the Bristol, Louisville, and Matamoras plants directly to Resin. The balance of the off-grade acrylic scrap at those plants were sold by soliciting competitive bids. (*Id.* at ¶ 7.) Bamberger did not submit any bids in 1996, 1997, or 1998 and did not purchase any off-grade acrylic scrap from A&H after July 1995. (*Id.* at ¶ 8.)

In short, the R&H Defendants increasingly sold to Resin the scrap it once sold to Bamberger. R&H has done so even though Bamberger has allegedly offered higher prices for the scrap than Resin and Resin allegedly was not capable of effectively using the scrap. From these alleged facts, Bamberger has concluded that Resin, or its president and sole shareholder, Defendant Blyth, has done something improper in order to lure R&H to shift business from Bamberger to Resin.

Accordingly, Bamberger's complaint asserts the following causes of action:

Count 1: Tortious interference — Resin, Blyth
Count 2: Common law unfair competition — Resin, Blyth
Count 3: Violation of 15 U.S.C. § 1025(a)(1)(B) — Resin, Blyth
Count 4: Breach of implied contract — R&H
Count 5: Breach of constructive contract — R&H
Count 6: Tortious interference with implied contract — Resin, Blyth
Count 7: Tortious interference with constructive contract — Resin, Blyth
Count 8: Breach of contract — R&H
Count 9: Tortious interference with contract — Resin, Blyth

R&H moves for summary judgment as to all counts directed against it (Counts 4, 5, and 8)[2]. Resin also seeks summary judgment as to all counts directed against it (Counts 1, 2, 3, 6, 7, and 9). Bamberger cross-moves to take additional discovery.

II. DISCUSSION

A. *Standard for Summary Judgment*

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Whether a fact is material is determined by the applicable substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue involving a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Healy v. New York Life Ins. Co.*, 860 F.2d 1209, 1219 n.3 (3d Cir. 1988), *cert. denied*, 490 U.S. 1098 (1989).

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[2] Counts 1, 6, 7, and 9 do not assert any claims against R&H; however, Bamberger alleged during oral argument that R&H is liable on the tortious interference counts because of the reference to John Does, employees of R&H who allegedly actively authorized and participated in the tortious conduct alleged. Even if such allegations were supported by facts, to the extent that Bamberger claims that R&H is liable to it for tortious interference, Bamberger's claims fail as a matter of law because a defendant cannot tortiously interfere with its own contract. *See Printing Mart v. Sharp Electronics*, 116 N.J. 739, 752 (1989) ("[I]t is fundamental to a cause of action for tortious interference with a prospective economic relationship that the claim be directed against defendants who are not parties to the relationship"); *see also Hurley v. Atlantic City Police Dep't*, 1995 WL 854478, at *14 (D.N.J. Aug. 4, 1995) (recognizing that "post-*Printing Mart* courts have generally found that agents of a corporation cannot be liable for malicious interference with another's contractual relations with the corporation."), *aff'd* 174 F.3d 95 (3d Cir. 1999), *cert. denied*, 120 S. Ct. 786 (2000).

The moving party has the initial burden of showing that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party satisfies this requirement, the burden shifts to the nonmoving party to present evidence that there is a genuine issue for trial. *Id.* at 324. Once the moving party has carried its burden of establishing the absence of genuine issues of material fact, the nonmoving party "may not rest upon mere allegations or denials" of its pleading, Fed. R. Civ. P. 56(e), but must produce sufficient evidence to reasonably support a jury verdict in its favor, *Anderson*, U.S. at 249, and not just "some metaphysical doubt as to material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

In determining whether any genuine issues of material fact exist, the Court must resolve "all inferences, doubts, and issues of credibility . . . against the moving party." *Meyer v. Riegel Prods. Corp.*, 720 F.2d 303, 307 n.2 (3d Cir. 1983) (citing *Smith v. Pittsburgh Gage & Supply Co.*, 464 F.2d 870, 874 (3d Cir. 1972)); *accord Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1077 n.1 (3d Cir. 1996).

Since a motion for summary judgment is designed to go beyond the pleadings, factual specificity is required of a party who opposes such a motion. *Celotex*, 477 U.S. 317, 322-23 (1986). Accordingly, in order to defeat a properly supported motion for summary judgment, a party may not merely restate the allegations of its pleadings. *Farmer v. Carlson*, 685 F. Supp. 1335, 1339 (M.D. Pa. 1988). Moreover, a party cannot rely upon self-serving conclusions, unsupported by specific facts in the record. *Celotex*, 477 U.S. at 322-23. A nonmoving party must point to concrete evidence in the record which supports each essential element of its case. *Id.* If the party fails to provide such evidence, then it is not entitled to a trial and the moving party is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56(e).

In deciding a summary judgment motion, however, the Court's role is not "to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 248. If the party opposing summary judgment has exceeded the "mere scintilla" threshold and has offered a genuine issue of material fact, then the Court cannot credit the movant's version of events, even if the quantity of the movant's evidence far outweighs that of its opponent. *Big Apple BMW v. BMW of N. Am.*, 974 F.2d 1358, 1363 (3d Cir. 1992).

B. *Admissibility of Bamberger's Supporting Affidavit*

Rule 56(e), Fed. R. Civ. P., requires that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." *See also* Local Civil Rule 7.2 ("[a]ffidavits shall be restricted to statements of fact within the personal knowledge of the affiant. Argument of the facts and the law shall not be contained in the affidavits. Legal arguments and summations in affidavits will be disregarded by the Court . . .").

Courts have enforced the directives of Rule 56(e) by making their own determinations of whether the contents of an affidavit are permissible facts within the affiant's personal knowledge or are impermissible factual and legal arguments, conclusions, or beliefs. *See San Filippo v. Bongiovanni*, 743 F. Supp. 327, 332 n.3 (D.N.J. 1990), *rev'd on other grounds*, 961 F.2d 1125 (3d Cir.), *cert. denied* 506 U.S. 908 (1992) (striking inadmissible elements of affidavit but permitting remainder); *see also Lombardi v. Cosgrove*, 7 F. Supp.2d 481, 492 (D.N.J. 1997) (denying motion to strike but ignoring conclusions, beliefs, and misstatements, and using the assertions based on personal knowledge).

1. Siow's Declaration

Plaintiff submits the Siow Declaration in support of its opposition to Resin, Blyth, Defendants' motion for summary judgment. Defendants urge the Court to reject the Siow Declaration as being replete with clearly inappropriate hearsay upon hearsay statements. Indeed, the Siow Declaration does contain impermissible legal conclusions and hearsay.

In response, Plaintiff points out that the Siow Declaration also includes information gleaned from documentary evidence such as shipment and quantities. Further, it argues that hearsay evidence contained in the Siow Declaration is permissible for opposing summary judgment because "the out-of-court declarant could later present the evidence through direct testimony." *J.J. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1542 (3d Cir. 1990), *cert. denied*, 499 U.S. 921 (1991). In *J.J. Feeser*, the hearsay evidence in question was an affidavit from Joseph Spagnola, a buyer for R&R Provision Company, who stated that he received complaints from his salespeople that they were losing sales to a competitor. The Third Circuit held that the trial court had erred in rejecting this hearsay testimony because there was "no indication that Spagnola's salesforce would be unavailable to testify at trial." *Id.*; *see Prtichard v. Southern Co.*, 92 F.3d 1130, 1135, *amended in part on reh'g*, 102 F.3d 1118 (11th Cir. 1996) (holding the employee could not use inadmissible hearsay testimony to defeat employer's motion for summary judgment in a Title VII action when the hearsay could not be reducible to admissible form at trial; there was nothing to indicate employee's deposition testimony, based on statements to unknown coworkers, would lead to admissible evidence), *cert. denied*, 520 U.S. 1274 (1997).

In contrast, here, there is no indication that any of the individuals who allegedly told Bamberger certain things are employed by Bamberger or are otherwise under its control. Moreover, despite 4 years of litigation, Bamberger has not

taken any depositions and has not produced any other affidavits corroborating its claims.

Therefore, to the extent that the Siow Declaration does contain legal conclusions and facts not within the affiant's personal knowledge, those portions will be ignored. Only matters within Siow's personal knowledge shall be considered by this Court.

2. Davis Report

Attached as Ex. A to the Declaration of Dennis F. Gleason ("Gleason Decl.") is a report prepared by Wayne Davis ("Davis Report"). The Davis Report is a memorandum to Al Caesar regarding two anonymous letters submitted to Lawrence Wilson, Chairman of the Board of R&H, that allege improprieties in the sale of off-grade material to Resin. The anonymous letters are attached to the Gleason Decl. as Ex. B and C.

Resin and Blyth contend that the Court is precluded from considering the anonymous letters because they are not reducible to admissible form. The Court agrees. *See J.J. Feeser*, 909 F.2d at 1542; *Pritchard*, 92 F.3d at 1135.

C. *Resin and Blyth's Motion for Summary Judgment on Counts 1, 6, 7, 9*

1. Tortious Interference With Prospective Economic Advantage Claim Under New Jersey Law[3] (Count 1)

Under New Jersey law, the four elements of a tortious interference claim are: (1) a plaintiff's existing or reasonable

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[3] The Court and all parties agree that New Jersey choice of law applies. Under New Jersey choice of law rules, Defendants agree that either New Jersey or Pennsylvania law applies. Plaintiff contends that New Jersey law applies. Because New Jersey has a dominant relationship between the parties and because there are no material differences between New Jersey and Pennsylvania laws that are applicable here, the Court will apply New Jersey law.

expectation of economic benefit or advantage; (2) the defendant's interference with that expectancy done intentionally and with malice; (3) the reasonable probability that the plaintiff would have received the anticipated economic benefit in the absence of the interference; and (4) damages resulting from the defendant's interference. *Printing Mart v. Sharp Electronics*, 116 N.J. 739, 751 (1989); *see also Federal Deposit Insurance Corp. v. Bathgate*, 27 F.3d 850, 871-72 (3d Cir. 1994); *Lightning Lube v. Witco*, 4 F.3d 1153, 1167 (3d Cir. 1993): *Cooper Distributing Co. v. Amana Refrigeration, Inc.*, 63 F.3d 262, 281 (3d Cir. 1995).

To establish the element of reasonable expectation of economic advantage, plaintiff need not make a showing of certainty of economic advantage; a reasonable probability of economic advantage, such as a reasonable expectation of making prospective sales to the public, is sufficient. *Zippertubing Co. v. Teleflex, Inc.*, 757 F.2d 1401 (3d Cir. 1985). Resin does not specifically challenge whether Bamberger had a reasonable expectation of economic advantage.

Resin does, however, contend that Bamberger's evidence of tortious interference lacks substance. A plaintiff seeking to recover under New Jersey law for tortious interference must show that the defendant specifically intended to harm the plaintiff. *Lightning Lube*, 4 F.3d at 1170. This element is satisfied when a plaintiff proves the defendant acted improperly with knowledge that interference would result. *Lightning Lube, Inc. v. Witco*, 802 F. Supp. 1180, 1191 (D.N.J. 1992), *aff'd*, 4 F.3d 1153 (3d Cir. 1993). The plaintiff must also prove that the defendant acted with malice. *Sgro v. Getty Petroleum Corp.*, 854 F. Supp. 1164 (D.N.J. 1994); *Ideal Dairy Farms, Inc. v. Farmland Dairy Farms, Inc.*, 282 N.J. Super. 140 (App. Div.), *certif. denied*, 141 N.J. 99 (1995). Malice, in the context of a tortious interference claim, is not used in its literal sense to mean defendants' ill will or spite toward the plaintiff, but rather to mean an intentional doing of a

wrongful act without justification or excuse. *Sgro*, 854 F. Supp. at 1183; *Labus v. Navistar Intern. Transp. Corp.*, 740 F. Supp. 1053, 1063 (D.N.J. 1990).

A "wrongful act" means "any act which will, in the ordinary course, infringe upon the rights of another to his damage, except and unless it be done in the exercise of an equal or superior right." *Id.*; *Association Group Life, Inc. v. Catholic War Veterans*, 120 N.J. Super. 85, 98 (App. Div. 1971) ("Tort liability for interference with prospective economic benefit arises where the conduct of the defendant is not in the reasonable exercise of an equal or superior right").

While the wrongful act need not be illegal *per se* to establish tort liability, *Lightning Lube*, 4 F.3d at 1167, it nevertheless must be "transgressive of generally accepted standards of common morality or law." *Association Group Life, Inc. v. Catholic War Veterans*, 293 A.2d 408, 415 (App. Div. 1971); *Inventive Music Ltd. v. Cohen*, 617 F.2d 29, 34 (3d Cir. 1980); *Labus*, 740 F. Supp. at 1063 ("The interference alleged must be both intentional and legally or ethically improper.").

The standard for determining maliciousness must be flexible, and the court must view the defendant's actions in the context of the case presented. *Ideal Dairy*, 282 N.J. Super. at 199. The cause of action contemplates a tripartite arrangement where a third party maliciously interferes with the present or prospective relationship between two other parties. *Borberly v. Nationwide Mutual Insurance Company*, 547 F. Supp. 959, 976 (D.N.J. 1981).

Bamberger, in its complaint, alleges that Blyth and Resin tortiously interfered with its prospective economic advantage in a number of different ways. First, Bamberger claims that Resin and Blyth misrepresented to R&H their capabilities regarding the purchase and resale of acrylic scrap, including the development of innovations and greater accountability.

See Compl., ¶ 67. Bamberger sets forth no evidence in support of this claim.

Next, Bamberger theorizes the following:

> Resin misrepresented its intent to supply Arco as a basis for the award of contracts over Bamberger. Bamberger R.56.1 Statement at ¶74. Then, once they were awarded contracts under this misrepresentation Resin diverted acrylic into Far Eastern markets for windfall profits. Bamberger R.56.1 Statement at ¶15. Further, Resin knowingly accepted scrap which had been awarded to Bamberger under Bamberger purchase order numbers, which the Resin defendants knew should properly have gone to Bamberger. Bamberger R.56.1 Statement at ¶¶58-59.

Pl.'s Opp'n Br., at 30 (footnote added). As discussed above, the Court will not consider those portions of the Siow Declaration that do not contain facts within Siow's personal knowledge or facts that Bamberger could later present through direct testimony. *See e.g.*, Siow Decl., at ¶¶ 93, 97, 104.

With respect to the contract with Arco, Bamberger maintains that Resin was only able to secure the long term arrangement with Arco *after* R&H agreed to supply all the acrylic scrap exclusively to Resin. Pl.'s SOMF, at ¶ 15; Siow Decl., at ¶ 93, To support this theory, Bamberger cites to document RH13 at Ex. B attached to Siow Declaration and R&H Admission Question 81, both of which do not appear to exist, or at least, were not provided to the Court.

Additionally, Bamberger makes a bald and unsupported allegation that "Pawlikowski told Bamberger that all sales of scrap would be made to Resin because it was the only one with capability to service Arco Chemical." Siow Decl., at ¶ 104. There is no evidence to support this contention. In fact, as evidenced by a memorandum from Blyth to Joseph Pawlikowski, purchasing manager for R&H, Blyth only requested

that Resin be given a "renewable multi-year contract for 100% of the scrap acrylic . . . to ensure that [Resin] can extract sufficient quantities of material suitable for manufacturing the Arco blend." Ex. F attached to the Pawlikowski Decl. Bamberger characterizes the claim contained in this memorandum as a misrepresentation because Resin actually delivered very little scrap to Arco and sold a portion of the scrap into Far Eastern markets. Bamberger, however, has not alleged that Resin was awarded the bid based on a representation that it would not sell to the Far Eastern markets, that it would deliver all or even a majority of the scrap to Arco, or that it would be the sole provider of scrap to Arco.

Further, Bamberger claims that Resin and Blyth tortiously interfered by accepting a higher quality product from R&H at lower prices than Bamberger had bid. Pl.'s SOMF, at ¶ 61. It also argues that Resin and Blyth improperly accepted shipments of scrap, under Bamberger's purchase order numbers, on which it was not the successful bidder. Pl.'s SOMF, at ¶¶ 58-59. These facts, when viewed in the light most favorable to Bamberger, do not suggest tortious interference by Resin or Blyth. Rather, it shows that Resin and Blyth did what was in their best interest, that is, pay a lower price for the scrap. Moreover, the Court fails to see how an error in documentation or Resin's acceptance of shipments that it paid for is, in and of itself, improper.

Finally, Bamberger's complaint contains an allegation that Resin and Blyth tortiously interfered with its prospective economic advantage by offering "inducements" to R&H employees. *See* Compl., ¶ 68. In its opposition brief, however, Bamberger fails to identify what those "inducements" were and moreover, does not present any evidence to support that assertion.

In short, Bamberger has not established that Resin's or Blyth's conduct was wrongful or that they acted improperly with knowledge that interference would result. Because the

second element of a tortious interference claim has not been established, the Court need not address the other remaining elements. Count 1 is **dismissed** against Resin and Blyth.

2. Tortious Interference With Contract (Counts 6, 7, 9)

The difference between tortious interference with prospective contractual relations and tortious interference with performance of contract is simply the existence of a contract as opposed to the plaintiff's reasonable expectation of an agreement. *Coast Cities Truck Sales, Inc. v. Navistar Int'l Trans. Co.*, 912 F. Supp. 747, 772 (D.N.J. 1995) (quoting *Printing Mart*, 116 N.J. 750-51).

Here, Bamberger has alleged tortious interference with implied contract, constructive contract, and contract. As discussed below, Bamberger has failed to demonstrate that there was any legally recognized contract between Bamberger and R&H. Therefore, Resin and Blyth cannot be liable for tortiously interfering with a non-existent contract. Even assuming the existence of an express, implied, and/or constructive contract, Bamberger has failed to establish that Resin or Blyth acted wrongfully and with malice to tortiously interfere with any such contracts. *See* discussion *supra*.

Therefore, Counts 6, 7, and 9 are **dismissed** against Resin and Blyth.

3. Unfair Competition

a. *Common Law Unfair Competition (Count 2)*

"[T]he essence of the law of unfair competition is fair play." *Holiday Inns, Inc. v. Trump*, 617 F. Supp. 1443, 1466 (D.N.J. 1985) (citations omitted). Bamberger maintains that, in addition to the Arco scheme, Resin and Blyth engaged in unfair competition by purchasing scrap acrylic that Resin and Blyth knew had been awarded to Bamberger via the bidding process, and by rigging the bidding process.

As discussed above, there is no evidence that Resin and Blyth made misrepresentations regarding the Arco contract. Likewise, Bamberger has not identified any evidence to buttress its theory that Resin and Blyth knew that the scrap had been awarded to Bamberger. Even assuming that Resin and Blyth had such knowledge, the fact that Resin bought the scrap is, without more, insufficient evidence for a jury to conclude that Resin unfairly competed with Bamberger. Further, other than mere conclusory allegations, Bamberger has not presented any evidence that Resin and Blyth rigged or were involved in rigging R&H's bidding process.

Therefore, Count 2 is **dismissed** against Resin and Blyth.

b. *Lanham Act (Count 3)*

In Count 3, Bamberger alleges a violation of 15 U.S.C. 1125 (a)(1)(B), known as the Lanham Act. Section 43(a) of the Lanham Act, as amended in 1988 and 1992, provides in pertinent part:

> (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which
>
> . . .
>
> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a)(1)(B).

Here, as discussed above, Bamberger has failed to establish that there was any tortious interference or misrepresentation made by Resin or Blyth. Accordingly, Count 3 is **dismissed**.

D. *R&H's Motion for Summary Judgment on Counts 4, 5, 8*

Bamberger does not dispute that it sent annual purchase orders to each R&H plant, or that R&H failed to provide off-grade acrylic scrap pursuant to these annual and spot purchase orders. Rather, Bamberger maintains that R&H breached implied, constructive, and express contracts when it failed to sell all or substantially all of the scrap to it indefinitely. Compl., at ¶¶ 77-83, 84-88, 93-96. Each of these contentions will be addressed in turn.

1. Breach of Implied Contract (Count 4)

Under New Jersey law, an implied contract "consists of an obligation arising from mutual agreement and intent to promise but where the agreement and promise have not been expressed in words." *St. Paul Fire and Marine Ins. Co. v. Indemnity Ins. Co. of North America*, 32 N.J. 17, 23 (1960) (citations omitted).

Bamberger claims that it should not be confined to the terms of the purchase orders because, except for the prices that were specified in the purchase orders, the parties largely ignored the other terms and instead, extended certain terms for their own convenience. As further evidence of the irrelevance of the purchase orders, Bamberger relies on the fact that R&H erroneously shipped product to Resin under Bamberger's purchase order numbers. Bamberger maintains that as a result of such conduct, R&H created a course of dealing that manifested an intent "to disregard the express bargain between the parties and to deal with Bamberger on the terms implied by its conduct." Pl.'s Opp'n Br., at 17.

According to Bamberger, R&H's conduct gave rise to an implied perpetual contract; more specifically, Bamberger contends that because for approximately the past 40 years, Bamberger was a significant purchaser of acrylic scrap from R&H and because it developed foreign markets for off-grade scrap,

the parties had a mutual agreement and intent for R&H to sell and Bamberger to buy for an ongoing and indefinite period so long as Bamberger performed satisfactorily.

Such conduct, however, evidences nothing more than the existence of a past fruitful relationship; based upon the longevity of that relationship, Bamberger unilaterally assumed or expected that that relationship would continue indefinitely. A long-standing relationship between a manufacturer and a purchaser does not establish an implied contract under which the manufacturer is obligated to indefinitely continue selling to the purchaser. In *Rothermel v. Int'l Paper Co.*, 163 N.J. Super. 235 (App. Div. 1978), *certif. denied*, 79 N.J. 487 (1979), the defendant manufacturer decided to break off a six year old relationship that it had with the plaintiff "merchant representative," who served as an intermediary between the defendant and two purchasers of the defendant's paper product, Western Electric and Printwrap. During the six year relationship, Western Electric signed six one-year contracts with the manufacturer in which the plaintiff was named as the manufacturer's "merchant representative." No contracts were involved with the plaintiff's sales of paper to Printwrap. Printwrap would telephone orders to the plaintiff, who, in turn, would order the requested paper from the manufacturer.

At the end of the six years, the manufacturer decided to sell only to large scale purchases and to cease dealing with customers through brokers and intermediaries. The plaintiff sued the manufacturer contending that because of their long relationship, the parties had entered into an implied contract that was renewable yearly so long as the plaintiff performed satisfactorily. The trial court dismissed the plaintiff's claim for breach of implied contract, finding that no contract existed. In upholding that ruling, the appellate division noted that the manufacturer was not obligated through the parties' prior course of dealing to supply paper to the plaintiff indefinitely:

> Westerns' relationship with [the manufacturer] was characterized by sharply limited one-year commitments and although plaintiff may have assumed or expected continued renewals, he had no legally recognized right to them . . .
>
> Fundamental to plaintiff's position is the view that his customers and supplier, by virtue of their prior course of dealing, were somehow in servitude to him for the indefinite future or until he could make other arrangements in the paper trade to secure similar income. According to this theory, tort law required [the manufacturer] to continue selling to him. We have found no law to support this novel contention.

Id. at 247.

Bamberger argues that *Rothermel* is factually distinguishable because the plaintiff was a "merchant representative" and because the manufacturer's reasons for terminating the relationship with the plaintiff was to restructure its business and because it eliminated from its product lines the types of paper that the plaintiff had brokered. The Court is not persuaded by Bamberger's attempt to distinguish *Rothermel*. To the extent that the manufacturer's decision to cease doing business with the plaintiff was not out of malice, the appellate court's decision did not turn on why the manufacturer chose not to renew the relationship. The plaintiff's position as a "merchant representative" was also not germane to the court's ruling. Even if that issue had been relevant, the relationship between the manufacturer and plaintiff was that of a "seller-buyer." *Id.* at 249.

Bamberger has failed to meet its burden. The fact that the parties contracted in the past and may not have strictly adhered to the terms of each purchase order is insufficient evidence upon which a jury can conclude that R&H mutually assented or intended to promise to sell to Bamberger for an

indefinite period. Moreover, implied contracts do not arise because occasionally mistakes such as the incorrect citation to a purchase order number occurred in the documentation, the parties supplemented or extended their agreement, or a shipment was made after a purchase order expires. Count 4 is **dismissed**.

2. Breach of Constructive Contract (Count 5)

A constructive contract, also known as a "contract implied-in-law" or a "quasi-contract," is defined under New Jersey law as follows:

> In essence, a contract action implied-in-law is a restitutionary claim. Like the equitable doctrine of restitution, the key element of a quasi-contract claim is that one party has been unjustly enriched at the expense of another. Recovery under both doctrines is typically measured by the amount the defendant has benefitted from the plaintiff's performance.

Wanague Borough Sewerage Authority v. West Milford, 144 N.J. 564, 575 (1996). A constructive contract "in reality is not a contract at all." *Id.* at 574. Rather, "it is imposed by law for the purpose of bringing about justice without reference to the intention of the parties." *St. Paul Fire and Marine Insur. Co.*, 32 N.J. at 22. The key element of a given contract is that defendant has been unjustly enriched at the expense of plaintiff. *See Wanague Borough*, 144 N.J. at 575.

Here, Bamberger has not claimed that R&H was unjustly enriched by its sale of scrap to Resin, but rather, that such sales were actually detrimental to R&H because Bamberger allegedly was willing to pay R&H higher prices. Moreover, even if R&H was enriched by its decision to sell its off-grade acrylic scrap on the basis of competitive bids or its decision to sell to Resin, there is no evidence for a jury to find that such benefits were motivated by anything other than ordinary

commercial motives and were made for legitimate commercial reasons.

Therefore, Count 5 is **dismissed**.

3. Breach of Contract (Count 8)

Bamberger claims that because it purchased scraps from R&H for more than 40 years, that conduct is ample evidence of the existence of a contract under Uniform Commercial Code ("UCC"), N.J.S.A. § 12A:2-204(a).[4] Moreover, Bamberger maintains that although the purchase orders generally provided for a one year term, R&H routinely ignored this provision and continued to ship acrylic to Bamberger long after the term had expired. Because Bamberger alleges the existence of a contract, it further claims that R&H was obligated to provide reasonable notice of termination. These assertions are without merit.

As a threshold matter, the Court notes the incongruity of Bamberger's contentions. It asks the Court to find that because over the course of 40 years, the parties ignored their express contracts, the parties were indefinitely bound to it.

The inconsistency of Bamberger's position aside, as R&H notes, the parties' course of dealing and course of performance serve to supplement, interpret, or add additional terms to the parties' agreement, rather than to supplant it. *See* N.J.S.A. 12A:1-205(4) ("The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable, express terms control both course of dealing and usage of trade . . ."); *see also Restatement 2d on Contracts*, § 203(B) ("[E]xpress terms are given

[4] That section provides that a contract for the sale of goods may "be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract."

greater weight than course of performance, course of dealing and usage of trade. . .").

Here, the parties' annual and spot purchase orders confirm that the intent of the parties as well as their course of conduct was to agree on the specific terms for the sale of the acrylic and to document their agreement on an annual and spot basis. Whether the parties strictly adhered to the terms of each purchase order when executing that purchase order is of no moment; it certainly does not give rise to a perpetual contract.

Moreover, no notice of termination was required because the annual and spot purchase orders were specific, and had express durations and termination dates. *See Rothermel*, 163 N.J. Super. at 249.

Therefore, the Court finds that R&H did not breach any contract with Bamberger when it failed to sell indefinitely all or substantially all of the scrap to Bamberger. Count 8 is **dismissed**.

E. *Bamberger's Motion for Additional Discovery*

Bamberger requests that the Court deny Defendants' motions and permit it to conduct depositions of persons interviewed during R&H's internal investigation in connection with the Davis Report. Bamberger has requested on numerous occasions that discovery be continued or reopened. Then Magistrate Judge Cavanaugh, as well as this Court, when faced with an appeal of the Magistrate's decisions, have denied Bamberger's request on each occasion. *See* October 29, 1997, December 29, 1997, April 1, 1998, September 24, 1998, and August 23, 1999 Opinions.

Discovery is closed, and for the reasons noted in the Court's August 23, 1999 Opinion, Bamberger's application to conduct depositions is **denied**.

III. CONCLUSION

For the reasons noted above, Resin and Blyth's motion for summary judgment is granted. R&H's motion for summary judgment is also granted. All counts of Bamberger's complaint are dismissed. Bamberger's application for additional discovery is denied.

An appropriate Order accompanies this Opinion.

Dated: October 26, 2000

/s/ William G. Bassler

WILLIAM G. BASSLER, U.S.D.J.

UNREPORTED — NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-3741

CLAUDE P. BAMBERGER INTERNATIONAL, INC.,

Appellant

v.

ROHM AND HAAS COMPANY;
ATOHAAS AMERICA, INC.;
RESIN MANAGEMENT CORP.;
PETER C. BLYTH, individually;
JOHN DOE 1 THROUGH 10, being fictitious
names for persons whose identities are unknown

On Appeal from the United States District Court
for the District of New Jersey
D.C. Civil Action No. 96-cv-01041
(Honorable William G. Bassler)

Submitted Pursuant to Third Circuit LAR 34.1(a)
September 6, 2001

Before: SCIRICA, RENDELL and ALDISERT,
Circuit Judges

(Filed: September 24, 2001)

MEMORANDUM OPINION

SCIRICA, *Circuit Judge.*

This is an appeal from summary judgment in an action for tortious interference and breach of contract.

I.

Bamberger International, Inc. ("Bamberger"), a corporation that buys and sells acrylic scrap, filed suit against Rohm & Haas Company, Atohaas America, Inc. (collectively "R&H"),[1] Resin Management Corp. ("Resin"), and Peter C. Blyth ("Blyth"), claiming damages from R&H's decision to sell larger amounts of off-grade scrap to Resin, Bamberger's chief competitor. Previously R&H was Bamberger's sole supplier of acrylic scrap.[2] After more than four years of litigation, the District Court granted defendants' motion for summary judgment and dismissed all of Bamberger's claims with prejudice. This appeal followed.

II.

On February 27, 1997, almost a year after filing suit, Bamberger filed a motion to compel R&H to produce the "Davis Report," an internal investigation conducted by R&H's Director of Corporate Security regarding two anonymous letters submitted to R&H. Those letters alleged improprieties in the sale of acrylic scrap to Resin. R&H refused to produce the Report, claiming it was protected by the attorney-client privilege and the work-product doctrine. The Magistrate Judge granted Bamberger's motion to compel discovery of the Report on August 12, 1997. The District Court affirmed the Magis-

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[1] Atohaas America, Inc., a Delaware corporation, is a joint venture between Rohm and Haas and Elf Atochem, S.A., an alien corporation. On June 4, 1998, R&H sold its interest in A&H to Elf Atochem. After the sale, R&H engaged in no businesses that produce off-grade acrylic scrap.

[2] The nine-count complaint alleged R&H breached an implied contract (Count IV), breached a constructive contract (Count V), and breached a contract (Count VIII). The complaint also claimed Resin and Blyth, Resin's President and sole stockholder, tortiously interfered with Bamberger's relationship with R&H (Count I), unfairly competed (Count II), violated 15 U.S.C. § 1125(a)(1)(B) (Count VI), tortiously interfered with a constructive contract (Count VII), and tortiously interfered with Bamberger's contract with R&H (Count IX).

trate Judge's Order on December 27, 1997, but stayed its implementation pending R&H's appeal to this Court.[3]

On November 14, 1997, in the midst of the procedural dispute over the Davis Report, the Magistrate Judge took several actions during a case management hearing. First, the Magistrate Judge directed that deposition discovery not related to the Report should proceed. Second, with Bamberger's agreement, the Magistrate Judge established February 13, 1998 as the discovery cutoff date. Third, the Magistrate Judge limited Bamberger to ten depositions, all of which Bamberger said could be taken before February 13, 1998, a ninety-day period.

Bamberger chose not to take a single deposition. On February 11, 1998, two days before the discovery cutoff, Bamberger orally and in writing requested an extension. The Magistrate Judge denied the motion, finding that Bamberger failed to establish "good cause." The District Court affirmed on September 23, 1998,[4] finding that the "production or non-production of the Davis Report had nothing to do with Plaintiff's obligation to move forward with discovery." (Joint App. at 471.) Almost two years later, on October 26, 2000, the District Court granted summary judgment to the Defendants and denied a final motion from Bamberger to take additional depositions.

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[3] R&H voluntarily dismissed that appeal in August 1998.

[4] Bamberger then moved to reopen discovery on September 25, 1998. The Magistrate Judge denied this motion on October 15, 1998, finding Bamberger's arguments already answered in the District Court's disposition of September 23, 1998. The District Court affirmed this ruling on November 4, 1998. On January 28, 1999, Bamberger then moved for leave to conduct *de bene esse* depositions of 23 witnesses. The Magistrate Judge denied that motion on February 25, 1999. The District Court affirmed this ruling on August 23, 1999; we denied Bamberger's petition for a writ of mandamus on March 23, 2000.

III.

Bamberger first contends the District Court's affirmance of the Magistrate Judge's orders made during the November 14, 1997 case management hearing constituted an abuse of discretion. We disagree.

We review discovery orders under an abuse of discretion standard. *Mass. Sch. of Law v. Am. Bar Assn*, 107 F.3d 1026, 1032 (3d Cir. 1997); *Country Floors Inc. v. Gepner & Ford*, 930 F.2d 1056, 1062 (3d Cir. 1992). To prevail, Bamberger must demonstrate that the District Court's discovery restrictions "made it impossible to obtain crucial evidence" and that "more diligent discovery was impossible." *In re Fine Paper Antitrust Litig.*, 685 F.2d 810, 818 (3d Cir. 1982).

Bamberger contends the ninety-day deadline for completing all depositions forced it to choose either to depose those witnesses identified in the Davis Report before obtaining the Report or to preserve some — perhaps all — of its ten allotted depositions, hoping this Court would find the Report discoverable before the ninety-day period had lapsed. But this alleged "dilemma" falls short of the requirements necessary to demonstrate abuse of discretion. Bamberger has not "explained how additional discovery would have cured the fundamental shortcomings of their claims." *Wisniewski v. Johns-Manville Corp.*, 812 F.2d 81, 90 (3d Cir. 1987). Bamberger states that it sought the Davis Report in order to determine "the facts surrounding the investigation," then "intelligently decide" whom to depose. (Appellant's Brief at 25.) But Bamberger has not demonstrated that the Report would have done more than merely assisted it in discovery strategy. Regardless, Bamberger did not show "more diligent discovery was impossible." *In re Fine Paper Antitrust Litig.*, 685 F.2d at 818. Bamberger took no deposition discovery. The Magistrate Judge concluded Bamberger "had ample opportunity to conduct discovery and has failed to do so at its peril." (Joint App. 365) We agree. Moreover, the justifications proffered by Bam-

berger for extending discovery — including the trial schedules of counsel, vacation conflicts, and the imminent holiday season — were foreseeable to Bamberger and therefore do not constitute "good cause." *See Martin v. Cooper Plumbing & Heating, Inc.*, 145 F.R.D. 372, 374 (E.D. Pa. 1992). The District Court acted within its sound discretion in enforcing the ninety-day deadline. Bamberger's due process rights were not violated.

Bamberger next contends the District Court's limitation of ten depositions compelled it to choose whom to depose from among the twelve witnesses identified in the Davis Report and others not so identified. But Bamberger does not demonstrate that this restriction "made it impossible to obtain crucial evidence," nor that "more diligent discovery was impossible." *In re Fine Paper Antitrust Litig.*, 685 F.2d 810, 818 (3d Cir. 1982). The District Court's enforcement of the limitation was well within its discretion.

Bamberger also claims the District Court "effectively denied" production of the Davis Report by enforcing the ninety-day deadline. But the District Court held on September 23, 1998 that if Bamberger had made "any good faith effort whatsoever" to comply with the scheduling order, the Magistrate Judge would have allowed Bamberger to "wrap up any loose ends" created by the disclosure of the Davis Report. (Joint App. 410.) Having voluntarily entered into the scheduling order on November 14, 1997, Bamberger's subsequent inaction created its discovery "dilemmas." The District Court did not "impermissibly sanction" Bamberger by enforcing the deadline. *Accord Gray v. Town of Darien*, 927 F.2d 69, 74 (2d Cir.) (holding that plaintiffs' failure to comply with a scheduling order justified the district court's ending discovery despite plaintiffs' "speculative" objection that further discovery would result in the development of additional facts), *cert denied*, 502 U.S. 856 (1991).

Bamberger also alleges the District Court's restrictions on documents containing proprietary information of R&H, Resin, and Blyth were based on a mischaracterization of the complaint.[5] We see no error. The Magistrate Judge, when imposing these restrictions, left open the possibility that if Bamberger uncovered evidence through other channels, it could potentially discover the proprietary documents sought.[6] Instead, the District Court found Bamberger chose to rely on speculations initially pleaded in its complaint. We see no abuse of discretion in closing discovery based on Bamberger's failure, despite sufficient time allowed under the scheduling order, to conduct depositions. *See Mass. Sch. of Law*, 107 F.3d at 1034 ("[T]he district court, by allowing fairly extensive discovery and then closing discovery and entertaining the summary judgment motion, did not abuse its discretion.").

In its final argument relating to discovery rulings, Bamberger challenges the District Court's affirmance of the Magistrate Judge's refusal to permit Bamberger to take twenty-three *de bene esse* depositions after disclosure of the Davis Report. The District Court found Bamberger sought these depositions as "a surrogate for discovery depositions." (Joint App. 534-35.) Therefore, the depositions were subject to the scheduling order's cutoff for all deposition discovery. That ninety-day period had lapsed, and the District Judge did not abuse its discretion by refusing to allow Bamberger to take these *de bene esse* depositions.

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[5] Bamberger alleges that R&H began discriminating against Bamberger by selling Resin more desirable acrylic scrap in greater quantities and by diverting to Resin scrap for which Bamberger had provided the highest bid.

[6] The Magistrate Judge stated, "I don't think the facts of the case. . . would allow the plaintiff to seek the type of proprietary and financial information regarding these companies. . . . I don't think there's been enough . . . beyond mere speculation as to how you could get this type of information. Now . . . maybe after you take some depositions and you get some other information, you might have something different. But I just don't see it yet. . . ." (Joint App. 271-72.)

Despite Bamberger's arguments to the contrary, the District Court did not abuse its discretion by issuing the challenged discovery rulings. We will affirm the District Court in all respects.

IV.

Bamberger maintains the District Court erred in granting summary judgment. We review the grant of summary judgment de novo. *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 743 (3d Cir. 1996); *Sempier v. Johnson*, 45 F.3d 724, 727 (3d Cir. 1995). Summary judgment is appropriate only when the admissible evidence fails to demonstrate a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). When the moving party does not bear the burden of persuasion at trial, that party may meet its burden on summary judgment by proving the nonmoving party's evidence is insufficient to carry its burden of persuasion. We give the nonmoving party the benefit of all reasonable inferences. *Bray v. Marriott Hotels*, 110 F.3d 986, 989 (3d Cir. 1997). We have observed that "[c]onclusory statements, general denials, and factual allegations not based on personal knowledge would be insufficient to avoid summary judgment." *Olympic Junior, Inc. v. David Crystal, Inc.*, 463 F.2d 1141, 1146 (3d Cir. 1972).

Bamberger contends the District Court erred in failing to consider the testimony of Mo-Li Siow ("Siow Declaration"), responding to defendants' motion for summary judgment.[7] The Siow Declaration contains statements from unidentified persons allegedly made to Bamberger employees. But Bamberger never demonstrated those statements would be admissible at trial, a prerequisite to considering hearsay statements at the summary judgment stage. *Philbin v. Trans Union Corp.*,

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[7] This Declaration analyzed the documents produced by Defendants. Siow is Bamberger's Vice President and the wife of Claude Bamberger, the founder and sole stockholder of Bamberger International.

101 F.3d 957, 961 n.1 (3d Cir. 1996); *Stelwagon Mfg. Co. v. Tarmac Roofing*, 63 F.3d 1267, 1275 n.17 (3d Cir. 1995), *cert. denied*, 516 U.S. 1172 (1996).[8] The District Court also properly rejected legal conclusions and facts offered in the Siow Declaration not within her personal knowledge. As for the remainder of the Declaration, the District Court considered those portions based on Siow's personal knowledge but rejected them as conclusory. We see no error.

Next, Bamberger challenges the District Court's exclusion of the Davis Report from Bamberger's answer to defendants' motion for summary judgment. The District Court found the two anonymous letters were not admissible evidence.[9] We agree. The letters had not been authenticated."[10] *See Countryside Oil Co. v. Travelers Ins. Co.*, 928 F.2d 474, 482 (D.N.J. 1995) ("Without a proper foundation there is no way for the Court to determine the genuineness of the document. . . . [T]he document is inadmissible hearsay under Fed.R.Ev. 801. Accordingly, the Court cannot consider the document in opposition to this [summary judgment] motion."). We see no error.

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[8] The only statement from the Siow Declaration brought to our attention is one allegedly made by Joseph Pawlikowski, R&H's Purchasing Manager, to an unidentified person at Bamberger. Pawlikowski supposedly said "that all sales of scrap [by R&H] would be made to Resin because it was the only one with capability to service Arco Chemical." (Joint App. 862-63, ¶ 104.) But Bamberger does not demonstrate this statement qualifies as a nonhearsay admission or an exception to the hearsay rule as a statement against interest. Moreover, Siow apparently did not learn of the statement through personal knowledge. The statement was properly excluded.

[9] For this proposition, the District Court cited *J.J. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1542 (3d Cir. 1990), *cert. denied*, 499 U.S. 921 (1991), and *Pritchard v. S. Co.*, 92 F.3d 1130, 1135, *amended in part on reh'g*, 102 F.3d 1118 (11th Cir. 1996).

[10] Nor does Bamberger's conclusory response that the letters are probative of R&H's state of mind and R&H's notice of fraud and self-dealing render the Report admissible.

Bamberger contends the District Court did not properly consider all the elements of its tortious interference claim. But under *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986), the nonmoving party responding to a motion for summary judgment must identify concrete evidence in the record supporting each essential element of its case. The District Court found Bamberger failed to provide evidence that "Resin's or Blyth's conduct was wrongful or that they acted improperly with knowledge that interference would result." (Joint App. 1206.) As such, Bamberger failed to establish its claim. We see no error.

Bamberger's final argument is that the District Court incorrectly granted summary judgment to defendants on its breach of implied covenant claim. Bamberger contends the District Court "ignored" this claim, which was based on R&H's failure to provide timely notice of contractual termination. But the Court specifically found that "no notice of termination was required because the annual and spot purchase orders were specific," with express duration and termination dates." (Joint App. 1215.) We see no error.

V.

For the foregoing reasons we will affirm the judgment of the District Court.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Anthony J. Scirica
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-3741

CLAUDE P. BAMBERGER INTERNATIONAL, INC.,

Appellant

v.

ROHM AND HAAS COMPANY;
ATOHAAS AMERICA, INC.;
RESIN MANAGEMENT CORP.;
PETER C. BLYTH, individually;
JOHN DOE 1 THROUGH 10, being fictitious
names for persons whose identities are unknown

On Appeal from the United States District Court
for the District of New Jersey
D.C. Civil Action No. 96-cv-01041
(Honorable William G. Bassler)

Submitted Pursuant to Third Circuit LAR 34.1(a)
September 6, 2001

Before: SCIRICA, RENDELL and ALDISERT,
Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States District Court for the District of New Jersey and was submitted pursuant to Third Circuit LAR 34.1(a) on September 6, 2001. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the judgment of the District Court entered October 27, 2000, be, and the same is hereby affirmed.

Costs taxed against appellant.

ATTE :

/s/
Clerk

DATED: 24 September 2001

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

July 27, 2001

No. 00-3741

CLAUDE P. BAMBERGER INTERNATIONAL, INC.,

Appellant

v.

ROHM AND HAAS COMPANY, et al.

(N.J. (Newark D.C. Civil No. 96-cv-01041 (WGB))

Present: SCIRICA, RENDELL and ALDISERT,
Circuit Judges.

1. Motion by Appellant for leave to file a Supplemental Reply Brief.

2. Response by Appellees Rohm and Haas Company and Atohaas America, Inc. to the Motion for leave to file a Supplemental Reply Brief.

/s/ Anthony Infante
Anthony Infante
Case Manager
267-299-4916

Response due 8/7/2001.
Listed on the merits for 9/6/01.
Appellant's Supplemental Reply Brief received on 7/27/01.

ORDER

The foregoing
is denied

By the Court,

Dated: 24 SEP 2001

/s/
District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-3741

Claude Bamberger Int'l, Inc. v. Rohm and Haas Co.

To: Clerk

1) Motion by Appellant for Leave to File Petition for Rehearing Out of Time

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The foregoing Motion for Leave to File Petition for Rehearing Out of Time is granted with filing as of the date of this Order.

For the Court,

/s/
Clerk

Dated: 18 October 2001
AWI/CC: JNB
RDS
DWO

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-3741

CLAUDE P. BAMBERGER INTERNATIONAL, INC.,

Appellant

v.

ROHM AND HAAS COMPANY;
ATOHAAS AMERICA, INC.;
RESIN MANAGEMENT CORP.;
PETER C. BLYTH, individually;
JOHN DOE 1 THROUGH 10, being fictitious
names for persons whose identities are unknown

(D.C. Civ. No. 96-cv-01041)

SUR PETITION FOR REHEARING

Present: BECKER, *Chief Judge*,
SLOVITER, MANSMANN, SCIRICA, NYGAARD,
ROTH, McKEE, RENDELL, AMBRO, FUENTES
and ALDISERT*, *Circuit Judges*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for

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* As to panel rehearing only.

rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

By the Court,

Dated: 30 OCT 2001

/s/

Circuit Judge

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CLAUDE P. BAMBERGER INTERNATIONAL, INC.,

Plaintiff,

v.

ROHM and HAAS COMPANY, a corporation of the State of Delaware, ATOHAAS AMERICA, INC., a corporation of the State of Delaware; RESIN MANAGEMENT CORP., a corporation of the State of Florida, PETER C. BLYTH, individually and JOHN DOES 1 through 10, being fictitious names for persons whose identities are unknown,

Defendants.

Civ. No. 96-1041 (WGB)

OPINION

APPEARANCES:

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Attorneys for Defendants Resin Management Corp. and Peter C. Blyth, individually

BASSLER, DISTRICT JUDGE:

Plaintiff Claude P. Bamberger International, Incorporated ("Bamberger") appeals Magistrate Judge Dennis M. Cavanaugh's February 25, 1999 order denying Bamberger leave to take *de bene esse* depositions, and Judge Cavanaugh's October 15, 1998 order denying Bamberger's motion to reopen discovery. This Court has jurisdiction pursuant to 28 U.S.C. Sections 1331 (federal question) and 1367 (pendent), or pursuant to 28 U.S.C. Section 1332 (diversity). For the reasons set forth below, Bamberger's appeals are denied and Judge Cavanaugh's orders are **affirmed**.

I. BACKGROUND

The parties are referred to the Court's previous opinions of October 29, 1997, December 29, 1997, April 1, 1998, and September 24, 1998 for further background. Since the 1940s, Bamberger purchased acrylic scrap from Defendants Rohm and Haas Company and Atohaas America, Inc, (together "R&H"). Since 1989, however, R&H has increasingly sold to Defendant Resin Management Corp. ("Resin") the scrap it once sold to Bamberger. R&H has done so even though Bamberger has allegedly offered higher prices for the scrap than Resin and Resin allegedly was not capable of effectively using the scrap. From these alleged facts, Bamberger has concluded that Resin, or its sole shareholder, Defendant Peter C. Blyth, has done something improper in order to lure R&H to shift business from Bamberger to Resin. It has alleged that

Blyth and Resin offered R&H kickbacks or other inducements.

The original discovery cutoff date was April 15, 1997. On February 24, 1997, Judge Cavanaugh entered an amended Scheduling Order, which extended discovery until June 1, 1997. Plaintiff then sought to compel Defendant to submit to broad discovery, a motion which Judge Cavanaugh denied. When Plaintiff indicated to Judge Cavanaugh that they intended to appeal this denial of the motion to compel, Judge Cavanaugh "specifically instructed" counsel to proceed with discovery and not to wait for decisions on the appeals. May 27, 1998 Opinion at 2. Additionally, during one of the hearings regarding the motion to compel, Judge Cavanaugh and counsel agreed that Plaintiff's counsel would continue with the discovery — especially depositions — that was possible without having access to the Davis Report. Judge Cavanaugh was clear that discovery should not come to a halt while Plaintiff awaited the production of the Davis Report. Plaintiff agreed to continue with several depositions. (Transcript of November 14, 1997 hearings ("Nov. 14 Tr.") at 30-35.)

Accordingly, in an Order dated December 5, 1997, Plaintiff obtained an additional 90 day extension of discovery, which set a discovery cutoff date for February 13, 1998. During this time frame, Plaintiff neither took a single deposition nor attempted to schedule a single deposition. Plaintiff did not bring any explanations for this failure to Judge Cavanaugh's attention prior to February 11, 1998. On February 11, 1998, just two days before the discovery deadline, at a scheduling conference before Judge Cavanaugh, Plaintiff requested yet another 90 days to complete discovery. At that time, "Plaintiff informed [Judge Cavanaugh] that no efforts had been made in the past ninety (90) days to take depositions or begin discovery, despite [Judge Cavanaugh's] specific instructions." (Opinion, filed May 27, 1998, at 3.) In an Opinion and Order dated May 27, 1998, Judge Cavanaugh denied Plaintiff's request for an ex-

tension, finding that Plaintiff failed to establish good cause. (*Id.* at 5-7.) Plaintiff moved for reconsideration and Judge Cavanaugh denied that motion in an Opinion and Order dated July 14, 1998. In that Opinion, Judge Cavanaugh stated that the pending appeals regarding the production of the Davis Report and the denial of the motion to compel discovery did not justify Plaintiff's delay. Judge Cavanaugh explained that he repeatedly warned Plaintiff to proceed with discovery notwithstanding the appeals. (Opinion, filed July 14, 1998, at 3, 6.) This Court affirmed Judge Cavanaugh's decision in an Opinion and Order dated September 23, 1998. The Court found:

> As Judge Cavanaugh repeatedly tried to make clear, the production or non-production of the Davis Report had absolutely nothing to do with Plaintiff's obligation to move forward with discovery. Had Plaintiff made any good faith efforts whatsoever to comply with Judge Cavanaugh's discovery schedules, the Court has no doubt that Judge Cavanaugh would have permitted Plaintiff to extend discovery to wrap up any loose ends created by the disclosure of the Davis Report. However, it is Plaintiff's total failure to make any attempt to conduct discovery that results in a finding that good cause does not exist for granting an extension. "Plaintiff has had ample opportunity to conduct discovery and has failed to do so at their own peril." (Opinion, filed May 27, 1998, at 7.)

September 23, 1998 Opinion at 9-10.

Bamberger then moved to reopen discovery based on the production of the Davis Report. Judge Cavanaugh denied this motion on October 15, 1998. In his Order, Judge Cavanaugh found that the motion to reopen discovery merely restated the same arguments made by Bamberger in its previous motion for extension. Since this Court had already rejected those arguments in its September 23, 1998 Opinion, Judge Cavanaugh held that the "mandate rule" required that he deny Bam-

berger's motion. Order of October 15, 1998. Bamberger then appealed this decision.

Bamberger also moved for leave to take *de bene esse* depositions, or depositions for use at trial. Bamberger argues that Judge Cavanaugh's Order ending discovery leaves it no other way of obtaining depositions of those witnesses with knowledge of the Davis Report. Judge Cavanaugh found this motion to be an attempt to circumvent his Order, and denied the motion on February 25, 1999. Bamberger also appealed this decision.

II. DISCUSSION

A. *Standard of Review*

In reviewing a magistrate's decision, the Court shall "set aside any portion of the magistrate's order found to be clearly erroneous or contrary to law." L. Civ. R. 72(c)(1)(A); *see* 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. p. 72(a); *see also Haines v. Liggett Group. Inc.*, 975 F.2d 81, 92 (3d Cir. 1992).

As interpreted by the Supreme Court, the clearly erroneous standard is met "when although there is evidence to support [a decision], the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." *United States v. Gypsum Co.*, 333 U.S. 364, 395 (1948); *accord Haines*, 975 F. 2d at 92.

B. *October 15, 1998 Opinion and Order*

Judge Cavanaugh applied the "mandate rule" to deny Bamberger's motion to reopen discovery. Bamberger argues that this doctrine was misapplied. The mandate rule is a corollary of the "law of the case" doctrine; the purpose of both doctrines is "to avoid the reconsideration of matters once decided during the course of a single continuing lawsuit." *Waldorf v. Borough of Kenilworth*, 875 D.N.J. 686, 695 (D.N.J. 1995). "'The mandate rule applies, however to those issues that were decided by the (higher) court.'" *Casey v. Planned Parenthood*

of Southeastern Pennsylvania, 14 F.3d 848, 856 (3d Cir. 1994). These rules apply in the case of "any issue that has actually been decided, whether expressly or by necessary implication." *Robert Billet Promotions Inc. v. IMI Cornelius Inc.*, 1998 WL 721081, *5 (E.D.Pa. October 14, 1998) (emphasis added), *citing*, *Bolden v. SEPTA*, 21 F.3d 29, 31 (3d Cir. 1994). Bamberger argues that since their arguments are made in the context of a motion to reopen, not a motion for extension, the mandate rule should not apply. The Court disagrees. The mandate rule applies to those issues which have been previously decided by the Court. This Court has held that the production of the Davis Report does not warrant any further discovery. Whether the motion is one to reopen or one for extension is irrelevant. Judge Cavanaugh did not commit clear error in applying the mandate rule. The October 15, 1998 Order of Judge Cavanaugh is therefore affirmed and the appeal dismissed.

C. *February 25, 1999 Opinion and Order*

Bamberger also moved for leave to conduct *de bene esse* depositions pursuant to Rules 45 and 32 of the Federal Rules of Civil Procedure. Bamberger gives four reasons why Judge Cavanaugh's ruling was clearly erroneous or contrary to law: (1) Judge Cavanaugh's ruling was based on Bamberger's alleged inactivity during the discovery period, an inactivity which should be properly attributed to R&H and the Court; (2) Judge Cavanaugh failed to take judicial notice that at least eight of Bamberger's requested *de bene esse* deponents were unavailable under Rule 32(a)(3); (3) Judge Cavanaugh failed to apply the *Meyers* factors in issuing what is essentially an order to exclude evidence; and (4) Judge Cavanaugh misstated and misapplied the law of *de bene esse* depositions.

1. Bamberger's Alleged Inactivity

Judge Cavanaugh has consistently found, in his previous Opinions and Orders in this action, that Bamberger failed to

seek discovery within the repeated extensions granted by Judge Cavanaugh. Bamberger claims that its inactivity resulted from the refusal of Defendant to produce certain documents. Bamberger filed a motion to compel on February 20, 1997, and the motion was not decided in full until August 22, 1997. This order was appealed by R&H, and when this Court affirmed Judge Cavanaugh's order, R&H appealed to the Third Circuit. While this appeal was pending, R&H produced the document, and the appeal was dismissed. The delay in resolving the motion to compel is insufficient to establish that Judge Cavanaugh's decision was clearly erroneous. At the hearing of November 14, 1997, Judge Cavanaugh discussed Bamberger's discovery requirements *in the absence of the Davis Report*. Bamberger's counsel represented to the judge that discovery need not halt pending the production of the report, and that it wished to depose 20 witnesses prior to the production of the report. After the report was produced, it may be inferred, Bamberger would have wished to depose more witnesses, those with a connection to the report. In the ninety day extension granted by Judge Cavanaugh, Bamberger did not notice or attempt to notice a single deposition, and provided Judge Cavanaugh with no notice or explanation of this failure until two days before the expiration of the deadline. Since the extension had been granted specifically for Bamberger to conduct discovery for which the Davis Report was unnecessary, and Bamberger represented to Judge Cavanaugh that such discovery could be conducted, any delay in compelling the production of the Davis Report — be it R&H, Judge Cavanaugh, this Court or the Court of Appeals who caused the delay — is irrelevant to Bamberger's inactivity.

The rest of Bamberger's arguments concerning alleged delays concern adverse discovery rulings handed down to them by Judge Cavanaugh. These arguments do not adequately refute Judge Cavanaugh's factual basis for denying their motion. Simply rehashing adverse discovery orders does not establish that Judge Cavanaugh or R&H are responsible for

Bamberger's failure to pursue discovery. The Court finds that Bamberger has failed to adequately show that their delay was caused by the actions of others.

Bamberger also argues that Judge Cavanaugh has failed to take into account the importance of the Davis Report in conducting deposition discovery. The Court disagrees. As discussed above in Section I and II-B., Judge Cavanaugh recognized the importance of the Davis Report, ordered its production, and specifically exempted Bamberger from conducting depositions on persons with knowledge of the report. Bamberger was instructed to proceed with discovery on those witnesses whose testimony would not involve the Davis Report. It was Bamberger's failure to do so — after stating to Judge Cavanaugh that there were twenty of these witnesses — that resulted in Judge Cavanaugh's denial of Bamberger's motion for extension. Judge Cavanaugh closed discovery based on Bamberger's failures and inefficiencies on matters entirely separate from the Davis Report. The importance of the Davis Report cannot serve to excuse these failures. Although Bamberger may feel that Judge Cavanaugh's actions were unduly punitive, it has failed to establish that his rulings were clearly erroneous or contrary to law.

2. Deponents Unavailable under Rule 32(a)(3)

Judge Cavanaugh found that Bamberger did not allege facts indicating that the proposed deponents are not officers of a party or that they are outside of the 100-mile threshold as required by Rules 32 of the Federal Rules of Civil Procedure. Opinion of February 25, 1999. Rule 45 provides that a subpoena may be quashed if it:

> requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a

> person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, . . .

Fed. R. Civ. P. 45 (c)(3)(A)(ii). Rule 32 provides that a deposition may be used "by any party for any purpose" if:

> the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition . . .

Fed. R. Civ. P. 32 (a)(3)(B). Bamberger argues that Judge Cavanaugh should have taken judicial notice that nine of the proposed deponents are outside the 100 mile threshold based on their place of residence or employment.[1] Since Bamberger only contests the refusal of Judge Cavanaugh to take judicial notice of the location of the nine deponents, the Court will confine this portion of its discussion to those nine deponents.

The burden of establishing the location of the deponents is on the party seeking the deposition. *Mark IV Properties, Inc. v. Club Development & Management Corp.*, 12 B.R. 854, 858 (S.D. Cal. 1981); *In the matter of Transcontinental Energy Corp.*, 1 B.R. 460, 463 (D. Nev. 1979), *citing*, *U.S. v. Empire Gas Co.*, 393 F.Supp. 903 (W.D. Mo. 1975), *aff'd*, 537 F.2d 296 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122, 97 S.Ct. 1158, 51 L.Ed.2d 572 (1977); *Grisom v. Logan*, 334 F.Supp. 273 (D.Cal. 1971). In this situation, Bamberger culled the names of proposed deponents from Rule 26(a) disclosures and the Davis Report. Opinion of February 25, 1999. The Court has no indication what source determined the claimed

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[1] Specifically, Bamberger asserts that Peter Blyth and Kenneth Brown live in Tampa, Florida; Paul Blanco lives in Brownsville, Texas; Karl Herold works in Tampa, Florida; Michael Johnson works in Knoxville, Tennessee; Sue Lee works in Deer Park, Texas; Saurabh Naik works in Baltimore, Maryland; Gerald Ray works in Louisville, Kentucky; and Kenneth Wilson lives in Louisville, Kentucky. Plaintiff. Mem. at 18.

location of these witnesses. There is no affidavit or certification before this Court showing how the locations were determined, and no indication there was such a document before Judge Cavanaugh. Unsupported assertions of the location of witnesses are insufficient to make the required showing. *Cf.*, *Mark IV Properties*, 12 B.R. at 858 (testimony of witnesses under oath used to establish that they lived more than 100 miles from the place of trial). Bamberger has therefore failed to make the required showing that the deponents live 100 miles from the place of trial.

In addition, the Court is not convinced that Rule 32 is the proper mechanism for obtaining depositions. Rule 32 governs the circumstances under which a deposition may be used — the most common example being its use at trial — and not the circumstances under which a deposition may be taken. Bamberger has not provided the Court with any authority supporting its interpretation of the function of Rule 32. The Court therefore finds that Rule 32 may not be used to compel the deposition of a party more than 100 miles from the place of the trial after the discovery period has closed.

3. Application of *Meyers* Factors

Bamberger also argues that Judge Cavanaugh erred in failing to apply the *Meyers* factors to determine whether to allow *de bene esse* depositions. Bamberger argues that Judge Cavanaugh should have applied the *Meyers* factors when deciding to close the discovery period, as the closure amounted to the exclusion of evidence.[2] *Meyers* dealt with the situation where a party had failed to list expert witnesses on a pretrial

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[2] In the heading in its memorandum for this portion of the discussion, Bamberger identifies the limitation of witnesses to ten as the trigger for applying the *Meyers* factors. Since Bamberger, in its actual discussion, identifies the closing of the discovery period and the attendant refusal to allow the deposition of the Davis witnesses as the trigger for applying *Meyers*, the Court does not treat the issue of the limitation of the number of witnesses.

order, and later attempted to call them at trial. The factors require that the Court take into account: (1) the prejudice to or surprise of the party against whom the excluded witnesses would have testified; (2) the ability of that party to cure the prejudice; (3) the extent to which waiver. of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in the court; and (4) bad faith or willfulness in failing to comply with the district court's order. *Meyers v. Pennypack Woods*, 559 F.2d 894, 904-05 (3d Cir. 1977), *overruled on other grounds*, *Goodman v. Lukens Steel*, 777 F.2d 113 (3d Cir. 1985), *aff'd* 482 U.S. 656, 107 S.Ct. 2617, 96 L.Ed.2d 572 (1987); *ABB Preheater, Inc. v. Regenerative Environmental*, 167 F.R.D. 668, 672 (D.N.J. 1996).

First, the Court notes that Bamberger has cited no law to show that the *Meyers* factors apply to this situation. This situation does not involve the exclusion of witnesses from a pretrial order. Bamberger has cited no law in support of the proposition that *Meyers* applies to the refusal of a court to allow *de bene esse* depositions.

Even if *Meyers* does apply, however, an application of the factors does not find that Judge Cavanaugh's decision is clearly erroneous. Bamberger argues that Judge Cavanaugh gave it permission to forbear from taking the depositions of witnesses with knowledge of the Davis Report. After Bamberger failed to take or notice any depositions during the last ninety day extension period, Bamberger states that Judge Cavanaugh reversed his position and denied them the right to take *de bene esse* depositions of the Davis witnesses. Judge Cavanaugh's opinions make clear, however, that he closed the discovery period as a result of Bamberger's willfulness in disregarding his instruction to proceed with the depositions of chose witnesses who did not have knowledge of the Davis depositions. Judge Cavanaugh based this ruling on Bamberger's counsel's own representation that there were twenty

witnesses without knowledge of the Davis Report who could be deposed in the ninety day period. Judge Cavanaugh found that Bamberger acted willfully in refusing to proceed with discovery as ordered, and therefore closed the discovery period. Bamberger appears to want the Court to find that Judge Cavanaugh needed to find actions done willfully or in bad faith that directly concerned the Davis witnesses. The Court will not do so. Judge Cavanaugh found that Bamberger willfully refused to proceed with discovery, and therefore closed the discovery period. Bamberger has not shown how the other dyers factors outweigh Judge Cavanaugh's conclusions concerning Bamberger's willfulness. *See In re Dorsie's Steak House, Inc.*, 130 B.R. 363, 366 (D. Mass. 1991) (a finding that party exhibited bad faith or willful disobedience justifies exclusion of witness under *Meyers*). The Court therefore refuses to find Judge Cavanaugh's holding clearly erroneous under *Meyers*.

D. *Application of Law of* De Bene Esse *Deposition*

Bamberger also contends that Judge Cavanaugh misstated and misapplied the law of *de bene esse* depositions. The Court disagrees. Judge Cavanaugh found that Bamberger's motion for *de bene esse* depositions was simply an attempt to circumvent his order closing discovery, and that the Bamberger's need to conduct *de bene esse* depositions resulted from its failure to conduct discovery, which led to the closing of discovery. Bamberger mischaracterizes Judge Cavanaugh's reasoning as "eliminating the *de bene esse* deposition." Judge Cavanaugh, however, merely pointed out that the Federal Rules do not distinguish between discovery depositions and depositions held to preserve testimony for trial, and stated that all depositions should be completed in accordance with his scheduling order. It is certainly true that, with regard to admissibility at trial, there is no distinction between discovery and trial depositions. *Tatman v. Collins*, 938 F.2d 509, 510-511 (9th Cir. 1991); *Melore v. Great Lakes Dredge &*

Dock Co., 1996 WL 598192, *2-3 (E.D. Pa. 1996); *Rosenthal v. Pennies Cab Co.*, 26 F.R.D. 116, 117 (W.D. Pa. 1960). The Court is also unable to find any support for the proposition that *de bene esse* depositions are not governed by the discovery closing dates set forth in the pretrial order. *See cf.*, *Henkel v. XIM Products, Inc.*, 133 F.R.D. 556 (D. Minn. 1991) (rejecting argument that deposition with purpose of preserving testimony for trial was not governed by the discovery closing date set forth in the pretrial order).

In this situation, Judge Cavanaugh found that Bamberger's proposed *de bene esse* depositions are merely a surrogate for discovery depositions. Bamberger itself admitted that it seeks *de bene esse* depositions since Judge Cavanaugh's closing of discovery left it no other way of deposing the Davis witnesses. The Court, however, agrees with Judge Cavanaugh that Bamberger should not be allowed to circumvent Judge Cavanaugh's response to its willful refusal to obey Judge Cavanaugh's order to conduct the depositions of the witnesses with no knowledge of the Davis Report. Bamberger should have deposed those witnesses within the ninety days Judge Cavanaugh allowed for that purpose. Having failed to do so, it may not now circumvent the closing of discovery through the misuse of *de bene esse* depositions. The Court affirms Judge Cavanaugh's February 25, 1999 Opinion and Order and dismisses Bamberger's appeal.

CONCLUSION

For the foregoing reasons, Bamberger's appeals are denied and Judge Cavanaugh's Orders are affirmed. An appropriate order follows.

Dated: 4/23/99

/s/ William G. Bassler

William G. Bassler, U.S.D.J.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CLAUDE P. BAMBERGER INTERNATIONAL, INC.,

Plaintiff,

v.

ROHM and HAAS COMPANY, a corporation of the State of Delaware, ATOHAAS AMERICA, INC., a corporation of the State of Delaware; RESIN MANAGEMENT CORP., a corporation of the State of Florida, PETER C. BLYTH, individually and JOHN DOES 1 through 10, being fictitious names for persons whose identities are unknown,

Defendants.

Civ. No. 96-1041 (WGB)

ORDER

This matter having come before the Court on Plaintiff Claude P. Bamberger International, Incorporated's ("Bamberger") appeals from Magistrate Judge Dennis M. Cavanaugh's February 25, 1999 Opinion and Order denying Bamberger leave to take *de bene esse* depositions, and October 15, 1998 Order denying Bamberger's motion to reopen discovery; and

The Court having considered submissions of Bamberger and Defendants Rohm and Haas Company and Atohaas Americas, Inc. (together "R&H") and Defendants Resin Management Corp. and Peter C. Blyth; and

For the reasons set forth in the Court's Opinion filed this day; and

For good cause shown;

It is on this 23rd day of August, 1999 ORDERED that Judge Cavanaugh's Order filed October 15, 1998 and Opinion and Order filed February 25, 1999 are **affirmed**.

IT IS FURTHER ORDERED that Bamberger's appeals of Judge Cavanaugh's Order filed October 15, 1998 and Opinion and Order filed February 25, 1999 are hereby **dismissed**.

/s/ William G. Bassler

WILLIAM G. BASSLER, U.S.D.J.